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12-4-01

No. 01-834

In The

Supreme Court of the United States

CITY OF LYNN,

Petitioner,

v.

TERRANCE THOMPSON,

Respondent.

On Petition For Writ Of Certiorari To The Massachusetts Supreme Judicial Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the deference demonstrated by the Massachusetts Supreme Judicial Court in affirming an arbitrator's decision to reinstate a police officer who has used excessive force on multiple occasions and repeatedly exposed his employer municipality to civil rights liability ignores the "explicit," "well-defined," and "dominant" public policy mandate of 42 U.S.C. § 1983.

Whether the Massachusetts Supreme Judicial Court impermissibly elevated the public policy of giving deference to an arbitrator's award made pursuant to a collective bargaining agreement over and above the "explicit, well-defined and dominant" public policy embodied in 42 U.S.C. § 1983.

LIST OF PARTIES

The caption of the case contains the names of all parties. None of the parties to this action are corporations.

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The Opinion of the Massachusetts Supreme Judicial Court is set forth in Appendix "A." [App. 1]. The Opinion of the Massachusetts Appeals Court is set forth in Appendix "B." [App. 18]. The Opinion of the Trial Court is set forth in Appendix "C." [App. 32]. The Opinion of the Arbitrator is set forth in Appendix "D." [App. 40].

JURISDICTION

The Opinion of the Massachusetts Supreme Judicial Court was issued on September 5, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

UNITED STATES CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or

declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

I. STATEMENT OF THE CASE

Facts

The Appellee Terrance Thompson (hereinafter "Thompson") was employed as a police officer by the Appellant City of Lynn (hereinafter "the City") for 19 years until his termination on May 11, 1994.

On September 15, 1993, Thompson and his partner, Officer Steven Anderson, were dispatched to the home of Elizabeth Raymer, in response to a 911 call alleging that Ms. Raymer had threatened her mother and that she may have to be committed to Arbour Hospital, a psychiatric facility in Jamaica Plain, Massachusetts.

While at Ms. Raymer's home, Thompson ordered Ms. Raymer to stop smoking and to release a cigarette lighter and a set of keys which she was holding in her left hand. Thompson testified that he believed that these objects could be used as weapons. Ms. Raymer did not release these objects voluntarily, and Thompson approached her and grabbed her left wrist. Thompson seized Ms. Raymer's left hand and raised her arm to a straightened position over her head. Thompson attempted to pry open Ms. Raymer's hand, while bending her arm back and twisting it with his other hand. In his attempt to control Ms. Raymer's arm and remove the objects from her hand, Thompson broke Ms. Raymer's left arm. Ms. Raymer

claimed that, as Thompson bent her arm back, she screamed that she was being hurt and would do whatever the officers wanted. Ms. Raymer begged Thompson to stop, however, Thompson refused to relinquish control of Ms. Raymer's arm.

On February 1, 1994, the City brought the following charges against Thompson regarding the incident with Ms. Raymer:

1. On the night of September 15, 1993, you did violate Section (G)(5) of the Rules and Regulations of the Lynn Police Department by use of more physical force than that which was necessary to accomplish a proper purpose in your attempt to handcuff Ms. Elizabeth Raymer, such force resulting in injury to Ms. Raymer.[1]

2. On or after September 15, you did violate Section (F)(6) of the Rules and Regulations of the Lynn Police Department in that you did fail to fully cooperate in a departmental investigation into the circumstances surrounding Ms. Raymer's injury on September 15, 1993.[2]

3. On and after September 15, 1993, you did violate Section (G)(2) of the Rules and Regulations of the Lynn Police Department and did engage in conduct unbecoming an Officer by virtue of the acts

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[1] The Rules and Regulations of the Lynn Police Department prohibit "the use of more physical force than that which is necessary to accomplish a proper police purpose."

[2] Department Rules and Regulations require that an officer "truthfully state the facts in all reports as well as when he appears before any judicial, departmental or other official investigation" and "cooperate fully in all phases of the investigations."

> and events involving your injury of Ms. Raymer referred to above and your subsequent conduct in reporting the events and providing information during the investigation of these events.[3]

After administrative hearings were conducted, Lynn Mayor Patrick J. McManus agreed with the conclusions of the hearing officer, who sustained the charges against Thompson and recommended Thompson's discharge.[4] The City discharged Thompson on May 11, 1994.

On May 24, 1994, Thompson, through his attorneys, made a demand for arbitration of his termination pursuant to Article 22 of the collective bargaining agreement, which grants to employees the right to submit grievances over suspension, dismissal, removal or termination directly to arbitration.

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[3] Departmental Rules and Regulations prohibit "any specific type of conduct which reflects discredit upon the member as a police officer, or upon his fellow officers, or upon the police department he serves."

[4] The hearing was conducted by a designee of the Mayor, in accordance with M.G.L. c. 31, § 41. The hearing officer stated that:

> "[I]n his eighteen years as a Lynn Police Officer, Officer Terrance Thompson has demonstrated that he is unable to conform his behavior to the Rules and Regulations of the Lynn Police Department. Violations of law and Rules and Regulations of the Lynn Police Department have caused injury to citizens and financial liability to the city. It is likely that the most recent action will subject the City to further liability. I believe as the appointing authority, your decision is clear cut."

At the arbitration hearing, the City argued, *inter alia*, that Thompson's past employment history, viewed in conjunction with the most recent incident, justified his termination and clearly demonstrated that Thompson could no longer be trusted to perform the duties of his position without being a threat to the citizens of Lynn and without placing the City at risk of future civil lawsuits. The City asserted that Thompson's employment records reveal an officer who is unable to control himself in difficult situations, such as the incident dated September 15, 1993, and that in Thompson's nineteen years as a Lynn Police Officer, seven civilian complaints were filed against him. Moreover, the City presented evidence at the hearing demonstrating that Thompson and the City were co-defendants in a civil rights action brought under 42 U.S.C. § 1983 in 1992 which alleged that Thompson had injured a civilian, Albert Howard, by using excessive force while handcuffing that individual.[5] A jury awarded $100,000 against the City for this incident.[6] The City

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[5] The Massachusetts Supreme Judicial Court, in upholding the award of the arbitrator, made much of the fact that the Trial Court and Massachusetts Appeals Court claimed that Thompson had broken Mr. Howard's arm. Although the Massachusetts Supreme Judicial Court found no evidence in the record indicating that Mr. Howard's arm had been broken in the incident, it is undisputed that (1) Thompson severely injured Mr. Howard's arm while effectuating an arrest; (2) Mr. Howard initiated a federal lawsuit under 42 U.S.C. § 1983 against the City and Thompson; (3) following the trial of the federal lawsuit, a judgment was entered by the jury in the amount of $100,000 against the City and Thompson; and (4) the jury award included $30,000 in punitive damages.

[6] The amended jury award reduced the judgment against the City to $50,000.00.

suspended Thompson for 15 days as a result of this incident. The matter went to arbitration, where the discipline was reversed in an unwritten decision. The Record also demonstrates that Raymer and her husband filed a lawsuit against the City and Thompson, alleging, *inter alia*, that Thompson had used excessive force against her in violation of 42 U.S.C. § 1983.[7] That matter was settled on January 16, 1997, in return for the City's payment to Raymer of $350,000.00.

Following an arbitration hearing relative to the City's termination of Thompson, the Arbitrator concluded that there was not justification for the City to conclude that Thompson had used excessive force in violation of the Lynn Police Department's Rules and Regulations. In finding that Thompson did not use excessive force, the Arbitrator stated that "Officer Thompson's past employment record in no way supports the conclusion that he can not conform his behavior to the rules of the Department." The Arbitrator found that Thompson had broken Ms. Raymer's arm in an attempt to place her under control. The Arbitrator found that Ms. Raymer was not using the keys and cigarette lighter as weapons. The Arbitrator found that Thompson did not fear for his own safety at the time of the incident with Ms. Raymer. The Arbitrator

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[7] Title 42 U.S.C. § 1983 (1994) provides in pertinent part as follows: "every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . ."

also found that the City failed to prove its charge alleging that Thompson failed to cooperate in the investigation. The Arbitrator agreed that Thompson had engaged in conduct unbecoming a police officer. In finding that Thompson had engaged in conduct unbecoming a police officer, the Arbitrator stated:

> Although exonerated of the charge of excessive force, the conduct of the officers at the scene is certainly deserving of no awards. There can be no question that Officer Thompson's handling of this mentally unstable woman was lacking in sensitivity.

As a result, the Arbitrator vacated Thompson's discharge and ruled that Thompson should be suspended for two weeks as a result of his "conduct unbecoming an officer." The City timely appealed the ruling of the Arbitrator to the Superior Court of Essex County, Massachusetts. Both parties filed Cross-Motions for Summary Judgment. The City argued in its Motion for Summary Judgment that the reinstatement of Thompson violated the public policy embodied by 42 U.S.C. § 1983. The Trial Court held that the Arbitrator's reinstatement of Thompson did in fact violate the public policy embodied in 42 U.S.C. § 1983. The Massachusetts Appeals Court upheld the decision of the Trial Court. The Massachusetts Supreme Judicial Court reversed the decision of the Trial Court on September 5, 2001.

II. REASONS FOR GRANTING PETITION

A. STANDARD OF REVIEW

This case is an appeal of a decision of the Massachusetts Supreme Judicial Court overturning a decision of a Massachusetts Superior Court (Bohn, J.) vacating an arbitration award reinstating Thompson to the position of police officer in the City of Lynn. It is the City's position that public policy considerations render the arbitration award unenforceable.

Under the well-established standards of review of labor arbitration awards, a federal court may not overrule an arbitrator's decision simply because the court believes its own interpretation of the contract would be a better one. *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960). However, the issue of whether an arbitrator exceeded the scope of his authority is always open for review. *Eastern Associated Coal Corporation v. United Mine Workers of America, District 17 et al.*, 531 U.S. 57 (2000); *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers*, 461 U.S. 757, 766 (1983). In addition, "the question of public policy is initially one for resolution by the courts." *W.R. Grace & Co., supra* at 766.

An employment reinstatement ordered by an arbitrator appointed pursuant to a collective bargaining agreement must be reversed when the reinstatement is contrary to public policy. *Eastern, supra*, at 62. An arbitrator exceeds his authority by granting relief beyond the scope of the arbitration agreement by awarding relief contrary to an "explicit," "well-defined," and "dominant" public policy. *Eastern, supra* at 62; *United Paperworkers v.*

Misco, 484 U.S. 29 (1987). An arbitration award must be reversed where the public policy is "ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *Eastern, supra*, at 62; *Muschany v. United States*, 324 U.S. 49, 66 (1945). While arbitrators are afforded deference in interpreting a contract's provisions, whether an arbitrator exceeds his authority is a question for the court, and an arbitrator is not entitled to deference on the question of whether the award was within his authority.

B. THE MASSACHUSETTS SUPREME JUDICIAL COURT INCORRECTLY UPHELD THE ARBITRATOR'S AWARD WHERE THE AWARD VIOLATED AN EXPLICIT WELL-DEFINED AND DOMINANT PUBLIC POLICY

1. The Public Policy Exception

An arbitrator may not award relief of a nature which offends public policy, and courts will vacate an arbitration award which offends an explicit, well-defined, and dominant public policy. *W.R. Grace & Co., supra* at 766. The public policy exception to the general enforcement of arbitration awards compels the vacation of the arbitration award in the instant case.

First, "to be vindicated, public policy must be well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *W.R. Grace & Co., supra* at 766. However, while the public policy must be well-defined and dominant, enforcement of an arbitration award does not have to violate a positive

law in order to violate public policy. *See Exxon Corp. v. Teamsters Local 877*, 980 F.Supp. 752 (D.N.J. 1997) (arbitration award reinstating chemical plant employee who adulterated urine sample used for drug/alcohol test violated public policy) *citing Stroehman Bakeries v. Local 776, Int. Brotherhood of Teamsters*, 969 F.2d 1436 (3rd Cir. 1992), *cert. denied*, 506 U.S. 1022 (1992).

Second, the public policy exception addresses "[only] disfavored conduct which is *integral to the performance of employment duties.*" (emphasis in original). *Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 861 F.2d 665, 671 (11th Cir. 1988), *cert. denied*, 493 U.S. 871 (1989). The public policy exception has been defined as follows:

> "Where the person performs his employment duties, and in doing so, violates standards, clearly and explicitly established by the people in their laws, a requirement that the employer suffer that malperformance and not discharge the offender does itself violate public policy." *Delta Air Lines, supra*, at 674. "Arbitration awards reinstating discharged employees are thus not upheld if the public policy relates to the worker's employment and the offense [goes] to the heart of the worker's responsibilities." *United States Postal Serv. v. American Postal Workers Union*, 736 F.2d 822, 823, 825 (1st Cir. 1984) ". . . . [I]n such cases, 'it is the employee qua employee who is the wrongdoer. It is [the employee's] employment which made his [conduct] violate law and public policy. . . . Furthermore, [the employer] could not permit [him] to perform his employment duties while his offensive conduct continued, without

being an accessory to the wrongdoing." *Delta Air Lines, supra* at 671.

Arbitration awards reinstating discharged employees will also be vacated if the award violates a public policy which relates to the employee's job and which exists because the job itself makes the employee's conduct an immediate threat to the general public. *Exxon Shipping Co. v. Exxon Seamen's Union*, 993 F.2d 357, 367 (3rd Cir. 1993).[8]

As discussed in detail below, the reinstatement of Thompson should be vacated because: (1) Thompson's conduct violated a well defined and dominant public policy as set forth in 42 U.S.C. § 1983; and (2) Thompson's misconduct arose in the course of, and the public policy violation exists by nature of, his duties as a police officer.

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[8] A public policy violation which exists because the employee's job makes his conduct an immediate threat to public safety is one form of public policy violation (i.e., it "also" violates public policy). *See, e.g., U.S. Postal Service*, 736 F.2d 822, 823, 825 (1st Cir. 1984). In the instant case, although Thompson has twice proven by his conduct that he is a danger to the citizens of the City of Lynn, it is not necessary to show a threat to safety in order to show that his reinstatement violates public policy. A public policy violation exists because Thompson exercised the authority entrusted to him by nature of his employment as a police officer in a manner which violates § 1983 and exposes the City to liability thereby. As in the *U.S. Postal Service* case, the public policy violation stems not from the wrong itself, but from the breach of the public trust which the conduct constitutes by nature of the authority with which the individual is entrusted because of his or her employment.

2. This Case Raises the Important and Unanswered Question of Whether The Subject Arbitration Award Violates a Well-Defined and Dominant Public Policy

Congress, in enacting 42 U.S.C. § 1983, espoused a well-defined and dominant public policy against reinstating a police officer who repeatedly injures citizens in the performance of his duties and who exposes the municipality to liability for such violations. As this Court has consistently stated, the purposes of a § 1983 action are to compensate persons who have suffered a constitutional violation and to deter or prevent official illegality. *Robertson v. Wegmann*, 436 U.S. 584, 590-592 (1978).

It is undisputed that Thompson broke Elizabeth Raymer's arm while performing his duties as a police officer. Ms. Raymer and her husband initiated a lawsuit against the City alleging that Thompson's conduct violated § 1983. Prior to the trial, the City paid $350,000.00 to the Raymers to settle all claims against the City and its employees. Prior to the incident with Ms. Raymer, Thompson severely injured the arm of another citizen, Albert Howard, in the course of performing his duties as a police officer. A jury found that Thompson used excessive force against Howard in violation of § 1983, and ordered the City to pay $100,000 (later reduced to $50,000) to Howard.

The fact that the City was found to have violated § 1983 and was sued a second time under the statute because of its continued employment of Thompson demonstrates that the City is "being forced to suffer the

consequences [of Thompson's] malperformance" in violation of public policy. *See Delta Air Lines*, 861 F.2d at 674. Indeed, the jury based its verdict against the City on the grounds that the City had failed to take steps to "discipline Thompson" which "caused the violation of the federal constitutional rights of Albert Howard by the excessive use of force." Obviously, the same § 1983 claim could have been (and was in fact) made in the Raymer complaint against Thompson and the City, and could likewise be brought in any future lawsuits against the City and Thompson. In fact the Honorable Justice Bohn of the Essex Superior Court found that it was the initial arbitration award in the Howard case which prevented the City from avoiding § 1983 liability for the Raymer incident, and further found that the Raymer arbitration award would prevent the City from avoiding liability under § 1983 for future instances in which Thompson injured citizens while performing his duties as a police officer. By reinstating Thompson as a police officer, the Arbitrator violated the public policy, espoused in § 1983, to punish and deter the use of excessive force against citizens done under the color of law, because requiring the City to employ Thompson places the citizens of the City of Lynn at risk of injury by Thompson in the course of his duties, and exposes the City to further liability for such actions.

The City respectfully states that requiring the City to employ a police officer who endangers public safety violates a well-defined and dominant public policy. Where there has been a finding of wrongful conduct in the course of performance of employment duties, and that conduct poses a public risk, the public policy exception

must be applied because reinstating the employee may make the employer an accessory to any future liability. *Delta Air Lines, supra,* at 665. Public policy dictates against requiring a public employer to retain an employee who engages in conduct which endangers citizens in the performance of his or her job. See, e.g., *Exxon Shipping Co. v. Exxon Seamen's Union,* 993 F.2d 357, 367 (3rd Cir. 1993); *NYC Transit Authority v. TWU Local 100,* 156 LRRM 2880 (App. Div. 2nd Dept., 1997) (vacating arbitration award reinstating subway operator on public policy grounds where the employee's conduct, which occurred while he was operating a subway, jeopardized the safety of the passengers). Thompson has proven that he endangers the citizens of Lynn in performing his job as a police officer by utilizing excessive force and inflicting serious injury on the residents of Lynn, and, therefore, an order requiring his reinstatement violates the explicit, well-defined and dominant public policy embedded in 42 U.S.C. § 1983.

3. The Massachusetts Supreme Judicial Court Decision Failed to Recognize That Thompson's Misconduct Related Directly to the Performance of His Duties As a Police Officer and As Such Is in Direct Conflict with This Court's Decisions in *W.R. Grace*

The public policy violation at issue exists not merely because Thompson broke the arm of a citizen, but because he broke her arm in the performance of his duties as a police officer. Thompson was engaged in the performance of his duties as a police officer when he broke Ms. Raymer's arm. Subduing potentially dangerous individuals is an integral part of the job of a police

officer and is the specific function, which Thompson was sent to perform on the night of September 15, 1993. As Thompson's conduct was directly related to his job activities, this case falls squarely within the public policy exception articulated in *W.R. Grace & Co., supra* at 766.[9]

The Arbitrator's award in the instant case violates a well-defined and dominant public policy by reinstating Thompson after he has demonstrated that, in performing his duties as a police officer, he endangers the safety of citizens of the City of Lynn, and exposes the City to liability in the defense of claims made by its citizens against the City based on his actions. The Arbitrator has, in effect, made the City an accessory to any future wrongdoing, in violation of the principles set forth in *W.R. Grace, supra* at 766. The award, which provides only the mildest slap on the wrist to Thompson, sends a dangerous message to other officers and to Thompson himself, and fails to uphold the policy articulated in § 1983.

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[9] *See also Highlands Hospital and Health Center v. AFSCME, District 84*, 151 LRRM 2629 (W.D. Pa. 1996) where the court vacated an arbitration award reinstating a patient case assistant who had pushed an 83 year old Alzheimer patient against the wall, causing him to slip to the floor, based on a well-defined and dominant public policy protecting patients from physical abuse.

4. The Facts of the Instant Matter Are Readily Distinguishable from *Eastern Associated Coal v. United Mine Workers* and Raise Important Issues Left Unanswered by this Court in *Eastern*

In *Eastern Associated Coal Corporation v. United Mine Workers of America, District 17, et al.*, 531 U.S. 57 (2000), this Court held that an arbitration award reinstating a driver who twice tested positive for marijuana use did not violate public policy. The *Eastern* Court reasoned that the "award violates no specific provision of any law or regulation. It is consistent with DOT rules." *Id.* The *Eastern* Court noted that the Omnibus Transportation Employee Testing Act contains provisions for long-term suspensions for drivers who actually operated vehicles while under the influence of drugs and/or alcohol. However, the Act does not require suspensions, and certainly did not require terminations, for drivers who test positive for drug use away from the job. Instead, the *Eastern* Court found that the general statutory and regulatory scheme underlying the public policy stresses rehabilitation for offending drivers, not discipline and discharge. Therefore, while the driver violated the public policy in question, his violation did not require termination, as the relevant policy itself dictated a lesser punishment. As such, an arbitrator's decision vacating a termination order did not violate a well-defined and dominant public policy.

The *Eastern* case is inapposite to the instant matter. Specifically, the statute and regulations relied upon by the employer in *Eastern* did not prescribe termination but instead favored the rehabilitation of an employee. Here,

the relevant statute, 42 U.S.C. § 1983, has no such rehabilitative provisions but instead is specifically designed to prevent the conduct engaged in by Thompson. In fact, 42 U.S.C. § 1983 requires Thompson's termination after his second substantiated offense in order to effectuate the statute's intent and accomplish its stated purpose. Specifically, Thompson must be removed from his position as a police officer in order to prevent further harm to members of the public, and thus effectuate the goal of deterrence articulated in 42 U.S.C. § 1983.

Further, the *Eastern* decision is factually distinguishable from the instant matter because the employee in that case did not physically and/or otherwise injure members of the public. In *Eastern*, the driver's offensive conduct did not occur while on the job. Instead, the employee tested positive for illegal drug use while away from the job. Here, however, Thompson committed acts of violence while in uniform and on duty thereby strengthening the nexus between his job responsibilities and the pertinent public policy.

5. The Massachusetts Supreme Judicial Court Failed to Recognize the Legislative Purpose Intrinsic to 42 U.S.C. § 1983 As Consistently Enunciated by This Court

There exists a well-defined and dominant public policy protecting members of the public from injury by police officers and other public officials. Congress clearly enacted 42 U.S.C. § 1983 to codify the clear public policy of protecting members of the public from injury at the

hands of renegade police officers. Thompson's misconduct in this matter, seriously injuring members of the public in the performance of his duties as a police officer, directly offends this public policy. In fact, on two separate occasions, the City has been held civilly liable under § 1983 as a result of Thompson's infliction of serious injuries upon members of the public. Subsequent to the first incident involving Albert Howard, the City was arguably not required to terminate Thompson. After the first § 1983 violation, there perhaps was still hope that Thompson could be rehabilitated or that the incident was an isolated lapse in judgment and not indicative of a pattern. However, after that officer is found liable for the use of excessive force and the city is consequently found liable for a § 1983 violation, the municipality is effectively notified of a potential threat to the safety of its citizenry, and must take steps to effectuate the policy articulated in § 1983, and prevent future violations. In a federal lawsuit involving a second violation by a particular police officer, a municipality may not defend itself against liability by claiming that the officer's unblemished record is inconsistent with the alleged behavior.[10] Instead, the municipality is absolutely liable for a second substantiated claim of a

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[10] Of course, the municipality must determine whether the civilian's claim has merit before determining what, if any, action to take. In the instant case, the City determined, after a Departmental investigation and hearing process, that Thompson broke the arm of a mentally ill woman in a situation in which he perceived no threat to himself, his fellow officers and/or members of the public. Accordingly, the City reasonably determined that the civilian complainant in the instant matter had a legitimate complaint and a potential claim under 42 U.S.C. § 1983.

§ 1983 violation by a particular officer. In such cases, the municipality is required to terminate the offending officer. Termination is clearly mandated as a precautionary measure to protect the public from further harm. The termination is further warranted to demonstrate to the trier of the 42 U.S.C. § 1983 claim that such behavior will not be condoned and that the officer in question will not be allowed to engage in similar behavior in the future. For exactly these reasons, a second substantiated violation of 42 U.S.C. § 1983 requires termination because a second legitimate 42 U.S.C. § 1983 claim unequivocally offends public policy.

In this vein:

> [in] order to establish municipal liability, 'plaintiff must show that the violation of his constitutional rights resulted from a municipal custom or policy'. . . . [A]lthough this rule 'does not mean that the plaintiff must show that the municipality had an explicitly stated rule or regulation, a single incident alleged in a complaint, especially if it involved only actors below the policy-making level, does not suffice to show municipal policy'. . . . [T]he inference that a policy existed may, however, be drawn from circumstantial proof, such as evidence that the municipality failed to train its employees as to display a deliberate indifference to the constitutional rights of those within its jurisdiction, or evidence that the municipality had notice of but repeatedly failed to make any meaningful investigations into charges that its agents were violating citizens' constitutional rights.

DeCarlo v. Fry, 141 F.3d 57, 61-62 (2nd Cir. 1998), *quoting Ricciuti v. New York City Transit Authority*, 941 F.2d 119, 122-23 (2nd Cir. 1991).

In *Foley v. City of Lowell, Massachusetts*, 948 F.2d 10 (1st Cir. 1991), the First Circuit Court of Appeals held that evidence of a similar incident of police misconduct subsequent to the incident on trial could be introduced into evidence to show the existence of a pattern and practice constituting a municipal policy. Specifically, the *Foley* Court found that evidence that the primary offending police officer also attacked another citizen in a similar fashion six months after assaulting Foley was admissible to demonstrate a municipal policy condoning such behavior, thereby establishing municipal liability under 42 U.S.C. § 1983. The *Foley* Court noted that the "lack of restraint the police officers exhibited on both occasions itself suggested the existence of an official policy of tolerating imbrutage."[11] *Id.*, at 14.

By analogy, the Ninth Circuit has held that a supervisor's failure to discipline an officer for his use of excessive force constituted ratification sufficient to give rise to supervisory liability. *See, Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991).

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[11] "Egregious instances of misconduct, relatively few in number but following a common design, may support an inference that the instances would not occur but for municipal tolerance of the practice in question." *Foley*, 948 F.2d at 14 *citing Carter v. District of Columbia*, 795 F.2d 116, 124 (D.C. Cir. 1986). "Tolerance of unconstitutional conduct is tantamount to encouragement of such conduct and is therefore a basis for municipal liability." *Foley*, 948 F.2d at 14 *citing Skibo v. City of New York*, 109 F.R.D. 58, 65 (E.D.N.Y. 1985).

Thompson's past conduct makes it painfully clear that he will continue to pose a threat to the public should he be reinstated to the position of police officer. However, the reinstatement of Thompson also evidences a municipal policy and practice of tolerating even the most blatant behavior of recreant police officers. In this regard, any citizen injured at the hands of any Lynn police officer in the future will successfully argue that the City's pattern and practice of condoning violations of 42 U.S.C. § 1983, as evidenced by the reinstatement of Thompson, warrants the imposition of § 1983 liability upon the City. As such, the City will continue to be named as defendant in § 1983 actions because of its failure to take the necessary steps to discipline Thompson for his egregious conduct.

In summary, the City has demonstrated that the Massachusetts Supreme Judicial Court's decision failed to recognize the congressional intent intrinsic to 42 U.S.C. § 1983. A second substantiated offense offends well-defined and dominant public policy and requires termination because such conduct may not be defended. Moreover, the City possesses an affirmative obligation to protect its citizens from harm. A less severe response would place the public at a substantial and unreasonable risk of harm. The City, by terminating Thompson, has sought to avoid future harm to its citizenry by taking the prophylactic action of severely disciplining officers who cross the line from proper to unacceptable conduct.

6. The Massachusetts Supreme Judicial Court Decision Ignored the Fact That 42 U.S.C. § 1983 Embodies a "Well-Defined and Dominant Public Policy Exemplified By Laws and Legal Precedents and Not From General Considerations of Supposed Public Policy" and Is in Direct Conflict With the Decision of This Court in *W.R. Grace*

To discern public policy, a court "must look to what the people have done on this subject through their elected representatives." *Delta Air Lines, Inc.*, at 672. Section 1983 embodies a long-standing, well-defined and dominant public policy exemplified by laws and legal precedents. Originally enacted as the Ku Klux Klan Act of 1871, § 1983 was intended to combat the widespread practices of local officials, including rank and file municipal officers, whose unwritten codes of conduct undermined and impeded the implementation of State and Federal law. Congressional debates surrounding the passage of § 1 of the Civil Rights Act of 1871, 17 Stat. 13 – the forerunner of § 1983 – confirm the important public policy considerations present in the instant action. On March 28, 1871, Representative Schellabarger, acting for a House select committee, reported H.R. 320, a bill "to enforce the provisions of the fourteenth amendment to the Constitution of the United States, and for other purposes." H.R. 320 contained four sections, Section 1, now codified in 42 U.S.C. § 1983 was the subject of only limited debate and was passed without amendment. Cong. Globe, 42d Cong., 1st Sess., App. 522 (1871). Representative Schellabarger, the author and manager of the bill in the House, explained in his introductory remarks, the breadth of construction that the Act was to receive:

> "I have a single remark to make in regard to the rule of interpretation of those provisions of the Constitution under which all the sections of the bill are framed. This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficially construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for the wrongs to all the people."

Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871). Supporters in both Houses of Congress expressed similar views of the Act's broad remedy for violations of federally protected rights. *See Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 683-87 (1978).[12]

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[12] Moreover, the United States Supreme Court noted in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 683-87 (1978), even the opponents of § 1 acknowledged that its language conferred upon the federal courts the entire power that Congress possessed to remedy constitutional violations. The remarks of Senator Thurman are illustrative: .

> "[This section's] whole effect is to give to the Federal Judiciary that which now does not belong to it. . . . It authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrong-doer in the Federal Courts, and

The central aim of the Civil Rights Act was to provide protection to those persons wronged by the "[misuse] of power, possessed by virtue of state law and made possible only because the wrongdoers are clothed with the authority of state law." *Monroe v. Pape*, 365 U.S. 167 (1961) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). By creating an express federal remedy, Congress sought to "enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Monroe, supra*, at 172.

How "uniquely amiss" it would be, therefore, if the government itself, "the social organ to which all in our society look for the promotion of life, liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct," were permitted to disavow liability for the injury begotten. *Owen v. City of Independence, Missouri*, 445 U.S. 622, 651 (1980). A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed. *Owen, supra* at 651. Moreover, the United States Supreme Court found it "abundantly clear" that

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that without any limit whatsoever as to the amount in controversy. . . . Whether it is the intent or not I know not, but it is the language of the bill; for there is no limitation whatsoever upon the terms that are employed, and they are as comprehensive as can be used." Globe App. 216-217.

Congress passed § 1983 "to afford a federal right . . . because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and claims of citizens to the rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by state agencies." *Monroe* at 180.

In the instant case, 42 U.S.C. § 1983 has its background in the Fourteenth Amendment to the Constitution of the United States and two hundred years of federal law. Therefore, it cannot be said that 42 U.S.C. § 1983 embodies mere general considerations of supposed public interests. *W.R. Grace, supra* at 766. Congressional abhorrence of violations of constitutional guarantees is further evidenced by the fact that 42 U.S.C. § 1983 provides for the imposition of punitive damages and attorneys' fees. Thompson's use of excessive force on two separate occasions violates an explicit public policy referenced by specific laws and legal precedents, to protect citizens from harm by government officials. In effect, the arbitrator's award requires the City to act with deliberate indifference to the constitutional rights of its citizens, in violation of *City of Canton v. Harris*, 489 U.S. 378 (1989).[13]

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[13] In *City of Canton v. Harris*, 489 U.S. 378 (1989), the Supreme Court expanded the scope of § 1983 municipal liability to include a failure to adequately train or discipline police officers when municipal deficiencies were the moving force behind constitutional injury and were a result of the city's deliberate indifference to the constitutional rights of its citizens. *See also Borsanaro v. City of Everett*, 871 F.2d 1151 (1st Cir. 1989) (holding that once a pattern of misconduct becomes evident and a department condones or tolerates such behavior it is logical to conclude that a constitutional violation is bound to occur in the future).

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Thompson's actions directly conflict with a positive federal law and his termination from the position of police officer is required.

7. The Supreme Judicial Court's Decision Upholding the Arbitrator's Award Raises The Important and Unanswered Question of Whether An Arbitrator's Subjective Characterizations of Facts Are Entitled To The Same Deference Accorded To The Arbitrator's Underlying Findings of Fact

The Massachusetts Supreme Judicial Court incorrectly concluded that in order to vacate the decision of the Arbitrator, a Court must engage in impermissible fact-finding. The Massachusetts Supreme Judicial Court failed to acknowledge that the undisputed facts as found by the Arbitrator require Thompson's termination on public policy grounds.

The undisputed facts reveal the following:

(1) Rather then grabbing Ms. Raymer's arm on the night of September 15, 1993, the Arbitrator concluded that "it would have been a more prudent course of action [for Thompson] to leave Mrs. Raymer with [the keys and cigarette lighter] at least until the ambulance had arrived at the scene."

(2) Thompson did not act on September 15, 1993 to preserve his own safety.

(3) The incident occurred in a situation in which Thompson possessed no objective basis to fear for his life or the life of others.

(4) Thompson was not attempting to handcuff Ms. Raymer at the time he broke her arm.

(5) Ms. Raymer was not being arrested at the time of the incident nor was she engaging in a crime.

(6) Ms. Raymer was in a vulnerable position at the time of the incident as a result of her mental illness.

(7) Ms. Raymer asked Thompson to stop because he was hurting her and stated that she would cooperate with Thompson. This statement was made before Thompson broke Ms. Raymer's arm.

(8) Thompson broke Ms. Raymer's arm on the evening of September 15, 1993.

(9) Thompson broke Ms. Raymer's arm during the course of his duties as a Lynn police officer.

(10) Thompson was a defendant in a civil rights action in 1992 for injuring a civilian by using excessive force while handcuffing the individual.

(11) The jury awarded the injured plaintiff $100,000 in this prior federal lawsuit.

(12) The City had suspended Thompson as a result of the allegations in the prior civil rights lawsuit.

Although the above-referenced facts are undisputed, the Arbitrator nevertheless characterized Thompson's behavior as "conduct unbecoming an officer" rather than as a use of excessive force. The Massachusetts Supreme Judicial Court failed to recognize that a review of the facts as found by the Arbitrator mandates Thompson's termination in light of public policy considerations,

regardless of the label attached by the arbitrator. The actual issue is whether based on the underlying facts, as found by the Arbitrator, and not his subjective characterization of these facts, the reinstatement of Thompson offends public policy and it is well-settled that the issue of whether an award violates public policy is a question for the Courts. *W.R. Grace, supra* at 766.

In summary, the Arbitrator's findings do not preclude this Court from finding that Thompson's conduct and the arbitrator's award ordering the City to reinstate Thompson violate public policy. Rather, a plain reading of the Arbitrator's findings of fact requires a finding that Thompson's reinstatement must be vacated on public policy grounds.

C. The Massachusetts Supreme Judicial Court Impermissibly Elevated the Public Policy of Giving Deference to An Arbitrator's Award Over and Above the "Explicit," "Well-Defined," and "Dominant" Public Policy Embodied in 42 U.S.C. § 1983

The Massachusetts Supreme Judicial Court upheld the arbitrator's reinstatement of Thompson by reasoning that the judiciary is bound by the arbitrator's findings and conclusions, even where such findings and conclusions are "grossly erroneous." *United Paperworkers v. Misco*, 484 U.S. 29 (1987). Despite recognizing the deference normally provided to the arbitrator, the Massachusetts Supreme Judicial Court, nevertheless, acknowledged that the arbitrator's conclusion that an officer, whose records include a civil rights judgment against himself and the city for excessive force (including

an award of $30,000 in punitive damages), possesses an unblemished record "appears notably unsound." *City of Lynn v. Thompson*, 435 Mass. 54, 62 (2001). Similarly, the Supreme Judicial Court stated that the arbitrator's conclusion that force sufficient to break someone's arm, even the arm of a person with fragile bones, is not "excessive" when the person does not even pose a current danger to the officers is a conclusion that seems indefensible. *Thompson, supra* at 62. The Supreme Judicial Court further noted that common sense dictates that the City would not voluntarily pay the Raymers $350,000 to settle her civil rights claim unless there existed significant evidence to support her claim. *Thompson, supra* at 62.

The Supreme Judicial Court reasoned that although the arbitrator's decision appears "unsound, poorly reasoned, or otherwise flawed," courts are not free to ignore an arbitrator's conclusions, as there is a strong public policy favoring the enforcement of arbitration decisions made pursuant to a collective bargaining agreement. *See also, Eastern Associated Coal Corporation v. United Mine Workers of America, District 17, et al.*, 531 U.S. 57 (2000). Clearly, where there are competing public policy considerations, courts must perform a balancing test. Here the public policy of protecting citizens from civil rights violations overwhelmingly outweighs the public policy, articulated in *Eastern*, of binding the parties to the arbitrator's construction of a contract. While a party to a collective bargaining agreement may contract for interpretation of ambiguous terms and resolution of disputes through arbitration, a party may not contract to circumvent the clearly articulated, well-defined and dominant public policy behind § 1983 and the Fourteenth Amendment to

the United States Constitution. It is precisely because the public policy behind 42 U.S.C. § 1983 is so "explicit," "well-defined," and "dominant" that a court must vacate an arbitrator's award which is "unsound," "indefensible," and "poorly reasoned" regardless of the impact upon the collective bargaining agreement.

This Court has held that the judiciary will set aside the arbitrator's interpretation of a collective bargaining agreement only in rare instances. *Eastern, supra* at 57, *citing Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960). Such a rare instance is present in the instant matter, as the public policy inherent to 42 U.S.C. § 1983, when balanced against the legal principle of giving deference to arbitrator awards, requires Thompson's termination.

III. CONCLUSION

For the reasons stated above, the petition for certiorari should be granted.

Respectfully submitted,

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December 2001

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CITY OF LYNN vs. TERRANCE THOMPSON.

SJC-08487

SUPREME JUDICIAL COURT OF MASSACHUSETTS

435 Mass. 54; 754 N.E.2d 54; 2001 Mass. LEXIS 487

May 10, 2001, Argued
September 5, 2001, Decided

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PRIOR HISTORY: Essex. Civil action commenced in the Superior Court Department on May 10, 1996. The case was heard by Robert H. Bohn, J., on motions for summary judgment. After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

DISPOSITION: Judgment reversed and ordered that judgment entered in favor of defendant affirming the arbitrator's award.

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COUNSEL: Michael J. Akerson for the defendant.

David F. Grunebaum (Joseph A. Sarno, Jr., with him) for the plaintiff.

The following submitted briefs for amici curiae.

Marcelino La Bella for city of Boston & others.

Andrew M. Fischer for Police Practices Coalition & others.

JUDGES: Present: Marshall, C.J., Greaney, Ireland, Spina, Cowin, Sosman, & Cordy, JJ. IRELAND, J. (concurring).

OPINION BY: SOSMAN

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OPINION:

SOSMAN, J. The present appeal arises out of an arbitration award, which reinstated the defendant, Terrance Thompson, to his position as a police officer with the city of Lynn. Instead of the discharge sought by the city for Thompson's alleged use of excessive force, the arbitrator determined that Thompson's only infraction amounted to conduct unbecoming an officer, for which the arbitrator imposed a two-week suspension without pay. The city sought review of the arbitrator's award in the Superior Court, where a judge vacated the award on the ground that Thompson's reinstatement violated public policy. On appeal, the Appeals Court affirmed the judgment of the Superior Court. *Lynn v. Thompson*, 50 Mass. App. Ct. 280, 737 N.E.2d 475 (2000). We granted Thompson's application for further appellate review. We now reverse, and order that judgment enter for the defendant affirming the arbitration award.

1. Facts. On May 11, 1994, the city discharged Thompson based on three charges stemming from an involuntary commitment of a patient on September 15, 1993. Those charges were (1) use of more physical force than was necessary in the application of handcuffs, resulting in injury to the person being handcuffed[1]; (2) failure to cooperate with the investigation of the incident[2]; and (3) conduct unbecoming an officer in

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[1] The rules of the police department prohibit "[t]he use of more physical force than that which is necessary to accomplish a proper police purpose."

[2] Department rules require that an officer "truthfully state the facts in all reports as well as when he appears before any

connection with both the incident and the investigation.[3] The parties submitted to arbitration the following issues: "Was there just cause for the discharge of the grievant, Terrance Thompson? If not, what shall the remedy be?" After six days of hearings, the arbitrator concluded that only the third charge (conduct unbecoming an officer) had been proved, and that the appropriate discipline for that infraction was a two-week suspension. The arbitrator's conclusion was based on the following factual findings.

Thompson was employed as a police officer with the city for nineteen years. A series of seven civilian complaints had been filed against him back in 1984. On one of those complaints, the police department "exonerated" Thompson of any wrongdoing; on five others, the department determined that the complaints were "unsubstantiated"; and on the remaining complaint, the department determined that the complaint was "part-substantiated," but imposed no discipline on Thompson.

Thompson was later named as a defendant in a civil rights action for injuries sustained by a civilian when Thompson used excessive force in applying handcuffs. In 1992, after jury trial, a judgment was entered against the

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judicial, departmental or other official investigation" and "cooperate fully in all phases of such investigations."

[3] Department rules prohibit "[a]ny specific type of conduct which reflects discredit upon the member as a police officer, or upon his fellow officers, or upon the police department he serves."

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city in the amount of $ 100,000.[4] The city imposed a disciplinary suspension on Thompson based on this

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[4] The city's brief explains that the original jury award was in the amount of $ 100,000, but the judgment was later amended. The amended judgment reflects the jury's findings that Thompson had used excessive force; that the city had a "practice, policy or custom of failing to take adequate steps to discipline, supervise and train Terrance Thompson," which caused the violation of the plaintiff's civil rights; and that the city was negligent. Compensatory damages were awarded in the amount of $ 28,700, plus punitive damages against Thompson in the amount of $ 30,000.

The city's brief states (in multiple places) that this earlier incident of excessive force also resulted in a broken arm, but the city provides no citation to anything in the record below that identifies the nature of that plaintiff's injuries. We have searched the entire record presented to us, and find in it no basis on which to draw any conclusion regarding the nature or the extent of the injuries sustained as a result of the prior incident. For reasons that are unclear, the Superior Court judge's memorandum of decision refers to the earlier incident as resulting in a broken arm, and the Appeals Court's decision adopted that same reference. *Lynn v. Thompson*, 50 Mass. App. Ct. 280, 281-282, 286, 288, 737 N.E.2d 475 (2000).

The requirement that a party provide "an appropriate and accurate record reference" for each and every fact set forth in the brief (Mass. R.A.P. 16 [e], as amended, 378 Mass. 940 [1979]) is not an idle technical requirement. Among other things, it prevents parties from exaggerating or distorting the facts as presented below, or from inserting into the analysis on appeal facts that are simply nonexistent. We have, in an abundance of caution, checked the records of the Federal court relating to the earlier civil rights action. *Albert Howard vs. Terrance Thompson, Civil Action No. 90-11213-H* (D.Mass., May 20, 1992). The plaintiff in that case did not sustain a "broken arm" or even allege that he had suffered a "broken arm." Rather, he claimed that, at the time Thompson placed him in handcuffs, he was recovering from recent surgery to his shoulder; that he so

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incident, but that suspension was reversed by an arbitrator.[5]

On September 15, 1993, Thompson was dispatched to the apartment of a woman (whom we shall refer to as "E.R.") following reports that E.R. had been threatening various family members. Thompson was accompanied by Officer Steven Anderson, and later joined by Sergeant John Karuzis. At the scene, Sergeant Karuzis determined that E.R. should be transported to a psychiatric hospital on an involuntary commitment. An ambulance was summoned.

While waiting for the ambulance to arrive, E.R. was sitting in a chair in the living room, smoking a cigarette. The family members whom she had been threatening had left the apartment, and she was no longer an imminent threat to them. However, the arbitrator found that E.R. was not "under control." E.R. told the officers that she would not go to the hospital, and threatened that she

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advised Thompson; that Thompson nevertheless cuffed his hands behind his back, thereby causing some reinjury to that shoulder; and that he therefore did not heal fully and properly from the earlier shoulder surgery.

The city's assertion that the earlier civil rights action resulted in a verdict against it stemming from Thompson's use of excessive force is supported by the record. Its assertion that that excessive force caused a broken arm is not supported by the record and is, according to the records from that case, an assertion that could not have been supported.

[5] There was no written decision by that arbitrator, and the city did not seek further review of that arbitration award. The arbitrator who ruled in Thompson's favor on that matter was not the same arbitrator who issued the decision presently under review.

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would not go "without a fight." At one point, E.R. grabbed a set of keys and a cigarette lighter from a nearby table. Thompson, of the view that these items were potential weapons, grabbed E.R.'s left arm and tried to pry her fingers open to remove the lighter. Meanwhile, Anderson took hold of E.R.'s right arm, and E.R. dropped the keys out of her right hand. Sergeant Karuzis ordered Anderson and Thompson to place E.R. in handcuffs.[6]

Anderson began placing a cuff on E.R.'s right arm, while Thompson was grappling with E.R.'s left arm and hand to remove the lighter. The arbitrator credited the officers' testimony that E.R. was thrashing about in the chair while they held her by the arms. Although he also credited E.R.'s testimony that she told Thompson he was hurting her,[7] he credited the testimony of Thompson and Anderson that they did not hear any such statement. The arbitrator's assessment was that, in the "chaotic state of affairs," with the officers' "focus on controlling [E.R.'s] hands" and Thompson "concentrating on removing the

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[6] Although the arbitrator concluded that the officers were not in any danger from E.R. at the time, he credited Thompson, Anderson, and Karuzis that they had a legitimate reason for wanting to dispossess her of the keys and cigarette lighter prior to the arrival of the ambulance. The city contended that Thompson had no need to approach E.R. at all, but the arbitrator noted that Sergeant Karuzis, the ranking officer at the scene, had ordered that E.R. be handcuffed and had endorsed Thompson's assessment that the objects should be removed from E.R.'s hands. As such, the arbitrator concluded that Thompson had not unjustifiably "inflamed the situation" by approaching E.R. to remove the items.

[7] E.R.'s husband, who was present in the room at the time, testified that he heard E.R. make such a statement.

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objects from her hands," Thompson did not hear E.R.'s warning to the effect that he was hurting her arm. In the course of this struggle, while Thompson had a hold of E.R.'s left arm, E.R.'s left arm broke.[8]

Thompson introduced expert testimony from an orthopedic surgeon to the effect that E.R.'s medical condition (in particular, her medications) would likely cause "deterioration of a person's bone structure" and "loss of bone mass," affect her "fracture threshold," and make her bones "more susceptible to fractures." The arbitrator credited this testimony, noting that it "cast serious doubt" on the city's assertion that E.R.'s arm had broken from the application of excessive force.

The arbitrator concluded that the evidence did not support the charge of excessive force, and indeed that Thompson had been "exonerated of the charge of excessive force." He rejected the city's assertion that Thompson had "lost his self control," "intended to harm [E.R.]," or retaliated against her for her "verbal outbursts towards the police." Rather, he concluded that Thompson's "actions were solely motivated to take the

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[8] E.R. claimed that her arm broke while Thompson had her arm held up, bent backward, in the process of trying to open her fist. Thompson claimed that he had succeeded in prying E.R.'s fingers open (at which point E.R. dropped the lighter) and was bringing her arm down to her side when the arm broke. The arbitrator did not resolve this dispute as to exactly how or when E.R.'s arm broke. He did conclude that the fracture occurred as part of Thompson's maneuvers connected with the removal of the items from her hands, not as part of any attempt to handcuff her. It was Anderson, not Thompson, who was in the process of placing a cuff on E.R.'s right wrist when E.R.'s left arm broke.

items away from [E.R.'s] hand," and that Thompson had not used excessive force in doing so.

The arbitrator also addressed the city's concern that the continued employment of Thompson exposed the city to liability for civil rights violations. He noted that "[t]here may be a certain point where an employer decides that because an employee is often the defendant in civil rights actions and continuously places the City and Department in [sic] risk of civil right [sic] judgments, that the employer has the right to discharge an employee." However, he concluded that Thompson did not have such a record. The civilian complaints from 1984 had not been substantiated, and, while the 1992 civil rights action had caused monetary loss to the city, the arbitrator noted that the prior arbitration had found that Thompson's suspension for that earlier incident had been "unwarranted." Thus, Thompson's official personnel record reflected no prior discipline, and the arbitrator concluded that Thompson had a nineteen-year unblemished career. As such, in the arbitrator's view, there was no "pattern of callous rogue behavior" that would justify Thompson's discharge.

The arbitrator also rejected the charge that Thompson had failed to cooperate in the investigation of this incident. Characterizing Thompson's post-incident report as "brief" and containing "grammatical errors," he found nothing untruthful in the report and noted that Thompson had never been asked to provide any "supplemental report."

The arbitrator did conclude that the charge of conduct unbecoming an officer had been proved, as

Thompson's "handling of this mentally unstable woman was lacking in sensitivity." However, in the arbitrator's view, "lack of sensitivity" on a single occasion was "not a dischargeable offense." Beyond that reference to "lack of sensitivity," the arbitrator did not identify any other conduct by Thompson that amounted to "conduct unbecoming an officer," nor did he identify with any further precision what acts or statements of Thompson he considered "lacking in sensitivity."[9] For that conduct unbecoming an officer, the arbitrator imposed a two- week disciplinary suspension and ordered Thompson reinstated with back pay.

2. Events subsequent to the arbitration. The city filed an action in the Superior Court seeking to set aside the arbitrator's award. In its complaint, the city alleged that a Federal civil rights action had been filed against Thompson stemming from the incident involving E.R., and that that matter was still pending. The city later amended its complaint to state that, on or about January 16, 1997, the city had settled the civil rights suit for the amount of $ 350,000, which amount was to be paid

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[9] At the hearing before the arbitrator, E.R. testified that, while waiting for the ambulance to arrive, Thompson was smoking and was letting the ashes fall on the floor. E.R. told Thompson not to smoke if he could not keep the ashes off her floor, to which Thompson replied, "Why not [?] You are." She also testified that, after her arm broke, Thompson refused to give his name. E.R. and her husband testified that, when E.R. then told Thompson that she was going to sue him, he responded, "So what [.] I am already being sued." These remarks, which displayed callous indifference to a mentally ill woman whom Thompson had seriously injured, would certainly qualify as "lacking in sensitivity."

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entirely by the city. The amended complaint annexed a copy of the settlement agreement, which reflects that the named defendants in the action included Thompson, Anderson, Karuzis, and the city. In exchange for the payment of $ 350,000, E.R. and her husband agreed to release their claims against all defendants. The settlement agreement recites that "all parties agree that this is a compromise of disputed claims and that settlement of these claims does not constitute an admission of liability by any party."

The city and Thompson filed cross motions for summary judgment with respect to the enforceability of the award reinstating Thompson. A judge in the Superior Court allowed the city's motion and vacated the arbitration award on the ground that it violated public policy. The judge's analysis was as follows: "The arbitrator made a finding of conduct unbecoming an officer, the conduct occurred in the course of the officer's employment duties, and the conduct posed a special risk to the public. The court must therefore respect the City of Lynn's public safety concerns regarding reinstatement of an officer who has broken the arms of two citizens while attempting to handcuff them,[10] and whose conduct has resulted in two 42 U.S.C. § 1983 claims against the City, one resulting in a judgment against the City and one still pending."

On Thompson's appeal, the Appeals Court agreed that the arbitrator's award violated public policy and therefore affirmed the judgment of the Superior Court. *Lynn v. Thompson*, 50 Mass. App. Ct. 280, 737 N.E.2d 475

[10] But *see* note 4, *supra*.

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(2000). Framing the issue as "whether the arbitrator in this case has acted against public policy in reinstating an officer who has twice broken the arms of citizens with whom he was dealing in the performance of his duties,[11] the last incident characterized as 'conduct unbecoming an officer,' and whose actions resulted in claims against him and his employer in Federal court for violations of 42 U.S.C. § 1983," *id.* at 286, the Appeals Court concluded that Thompson's reinstatement violated public policy. The arbitrator's decision "permits the continued presence on the police force of someone whose past and current conduct permits a strong inference that members of the public will be placed at risk of serious physical harm by an individual whose conduct is unbecoming an officer. The city should not be compelled to reinstate an individual who has, in the rather routine situation of this case, failed to exercise restraint and judgment in determining appropriate conduct for a police officer and where his conduct has resulted in serious injury." *Id.* at 288. "Two incidents of like nature, resulting in serious injury to members of the public, suffice to show that Thompson's continuing as a police officer poses a special risk of violent injury to the public and that the city-employer has been, and will continue to be, made 'an accessory to the wrongdoing.' " *Id.* at 288-289, quoting *Delta Air Lines, Inc.* v. *Air Line Pilots Ass'n, Int'l*, 861 F.2d 665, 671 (11th Cir. 1988), cert. denied, 493 U.S. 871, 107 L. Ed. 2d 154, 110 S. Ct. 201 (1989).

3. Discussion. Unlike our review of factual findings and legal rulings made by a trial judge, we are strictly

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[11] But *see* note 4, *supra*.

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bound by an arbitrator's findings and legal conclusions, even if they appear erroneous, inconsistent, or unsupported by the record at the arbitration hearing. "A matter submitted to arbitration is subject to a very narrow scope of review. Absent fraud, errors of law or fact are not sufficient grounds to set aside an award."[12] *Plymouth-Carver Regional Sch. Dist. v. J. Farmer & Co.*, 407 Mass. 1006, 1007, 553 N.E.2d 1284 (1990). *School Comm. of Waltham v. Waltham Educators Ass'n*, 398 Mass. 703, 705, 500 N.E.2d 1312 (1986). *Greene v. Mari & Sons Flooring Co.*, 362 Mass. 560, 563, 289 N.E.2d 860 (1972). "Even a grossly erroneous [arbitration] decision is binding in the absence of fraud." (Citation omitted.) *Trustees of Boston & Me. Corp. v. Massachusetts Bay Transp. Auth.*, 363 Mass. 386, 390, 294 N.E.2d 340 (1973). "An arbitrator's result may be wrong; it may appear unsupported; it may appear poorly reasoned; it may appear foolish. Yet, it may not be subject to court interference." *Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 861 F.2d at 670.[13]

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[12] There is no allegation of fraud in the present case.

[13] The city asks that we deviate from this long-standing precedent and adopt a scope of review akin to G.L. c. 30A, § 14, when reviewing an arbitration award involving public sector employment. To date, our extremely deferential review of arbitration awards has not been limited to the private sector. *See, e.g., Bureau of Special Investigations v. Coalition of Pub. Safety*, 430 Mass. 601, 603, 722 N.E.2d 441 (2000); *Massachusetts Highway Dep't v. American Fed'n of State, County & Mun. Employees, Council 93*, 420 Mass. 13, 15, 648 N.E.2d 430 (1995); *Plymouth-Carver Regional Sch. Dist. v. J. Farmer & Co.*, 407 Mass. 1006, 1007, 553 N.E.2d 1284 (1990); *School Comm. of Waltham v. Waltham Educators Ass'n*, 398 Mass. 703, 705, 500 N.E.2d 1312 (1986). The Legislature has identified the extremely limited grounds on which courts may vacate or modify arbitration awards, and it

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We are thus bound by the arbitrator's findings and conclusions in this case, no matter the extent to which we may believe that they are "grossly erroneous." *Trustees of Boston & Me. Corp. v. Massachusetts Bay Transp. Auth., supra.* Those findings include the express determination that Thompson did not use excessive or unnecessary force in restraining E.R. Rightly or wrongly, the arbitrator found that Thompson was justified in using force to extract the cigarette lighter from E.R.'s hand, that he did not apply an excessive amount of force when he held up her arm and pried open her fingers, and that it was E.R.'s exceptionally fragile bones and her own "thrashing about" that caused her injury. The arbitrator concluded that Thompson had been "exonerated" of the charge of excessive or unnecessary force, and we must accept that conclusion for purposes of our analysis.

The city seeks to set aside this arbitration award on the ground that it violates public policy. *See Bureau of Special Investigations v. Coalition of Pub. Safety,* 430 Mass. 601, 603-605, 722 N.E.2d 441 (2000); *Massachusetts Highway Dep't v. American Fed'n of State, County & Mun. Employees, Council 93,* 420 Mass. 13, 16-19, 648 N.E.2d 430 (1995). To meet the criteria for application of the public policy exception, the public policy in question "must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from

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has not, in those statutory provisions, drawn any distinction between public and private sector arbitration. G.L. c. 150C, §§ 11, 12. We reject the suggestion that we should enlarge the scope of our review of arbitration decisions in cases involving public entities or public employees.

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SEQ 014 JOB 11122AA1-000-02 PAGE-014 LAMANA
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general considerations of supposed public interests.' " *Massachusetts Highway Dep't v. American Fed'n of State, County & Mun. Employees, Council 93, supra* at 16, quoting *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers*, 461 U.S. 757, 766, 103 S. Ct. 2177, 76 L. Ed. 2d 298 (1983). "The public policy exception does not address 'disfavored conduct, in the abstract, but [only] disfavored conduct which is integral to the performance of employment duties' " (emphasis in original). 420 Mass. at 17, quoting *Delta Air Lines Inc. v. Air Line Pilots Ass'n, Int'l*, 861 F.2d at 671. "Finally, we require[ ] a showing that the arbitrator's award reinstating the employee violates public policy to such an extent that the employee's conduct would have required dismissal." *Bureau of Special Investigations v. Coalition of Pub. Safety, supra* at 605, citing *Massachusetts Highway Dep't v. American Fed'n of State, County & Mun. Employees, Council 93*, 420 Mass. at 19.

The Superior Court judge and the Appeals Court held that the reinstatement of Thompson would violate public policy, and that the arbitration award could therefore be set aside under the standards announced in *Massachusetts Highway Dep't v. American Fed'n of State, County & Mun. Employees, Council 93, supra.* However, they did so only by the expedient of ignoring the arbitrator's finding that Thompson had not used excessive or unnecessary force. They treated the arbitrator's holding that Thompson had engaged in "conduct unbecoming an officer" as a euphemism for the officer's having used excessive force and broken E.R.'s arm. Thus, they concluded that it would violate public policy to reinstate an

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SEQ 015 JOB 11122AA1-000-02 PAGE-015 LAMANA
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officer whose unbecoming conduct posed a risk of physical injury to the public. *Lynn v. Thompson, supra* at 288. While the arbitrator was vague as to precisely what conduct of Thompson was "lacking in sensitivity" and therefore was "unbecoming an officer," that finding of "conduct unbecoming an officer" cannot be treated as equivalent to a finding of excessive force. Such an interpretation of the arbitrator's decision would be expressly contrary to his repeated, explicit findings that the charge of excessive or unnecessary force had not been proved and that Thompson had been "exonerated" of that charge.

By reference to Thompson's status as a defendant in two civil rights actions, including one emanating from this same incident, the Superior Court judge and the Appeals Court also assumed that Thompson's unbecoming conduct constituted a violation of 42 U.S.C. § 1983. Again, however, this is precisely what the arbitrator decided had not been proved. In concluding that Thompson had not exerted unnecessary or excessive force, and that E.R.'s arm had broken while Thompson was exerting only a lawful and permissible degree of force, the arbitrator did not find any conduct on Thompson's part that would amount to a violation of E.R.'s civil rights.

One may well take issue with the arbitrator's analysis. The conclusion that an officer, whose record includes a civil rights judgment against himself and the city for excessive force (including an award of $ 30,000 in punitive damages), nevertheless has an unblemished record because another arbitrator determined that Thompson should not be disciplined for that incident,

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appears notably unsound. Similarly, the conclusion that force sufficient to break a person's arm, even the arm of a person with fragile bones, is not "excessive" when the person does not even pose a current danger to the officers is a conclusion that seems indefensible. Finally, common sense would dictate that the city would not voluntarily pay E.R. $ 350,000 to settle her civil rights claim unless there were significant evidence supporting that claim. Yet, we are not free to ignore the arbitrator's conclusions merely because they appear unsound, poorly reasoned, or otherwise flawed.

Accepting the arbitrator's conclusions, as we must, we are confronted with an officer who made insensitive remarks to a mentally unstable and, ultimately, seriously injured woman. Insensitive remarks, however offensive they may be, do not cause physical injury. From the arbitrator's conclusion that there was merely "insensitive" conduct that was unbecoming an officer, one cannot conclude that Thompson poses an ongoing risk of physical injury to members of the public. It may be distasteful to keep such an officer on the force, but it does not violate public policy.

Effectively, the Superior Court judge and the Appeals Court held that it violated public policy to continue the employment of a police officer who had twice injured citizens by the excessive use of force, finding as a source of that public policy 42 U.S.C. § 1983 (1994), and the city's own regulations against the use of "unnecessary" physical force. We need not parse the application of the public policy exception to such a scenario, because it is a factual scenario that the arbitrator expressly determined had not been proved. There being no basis on which to set aside

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that express determination, there is no basis for invoking the public policy exception, and thus no basis on which we may set aside this particular arbitration award.

Accordingly, we reverse the judgment and order that judgment be entered in favor of the defendant affirming the arbitrator's award.

So ordered.

CONCUR BY: IRELAND

CONCUR: IRELAND, J. (concurring). If the facts of the case were those reported by both the Superior Court and the Appeals Court, *Lynn v. Thompson*, 50 Mass. App. Ct. 280, 280-284, 296-298, 737 N.E.2d 475 (2000), I would reach the same conclusion for the same reasons.

To my way of thinking, an arbitrator's award reinstating a police officer in the face of conclusive evidence that the officer inflicted excessive force on multiple occasions, would violate public policy. However, given that the evidence before us does not support such findings, *see* ante at, I concur.

SEQ 320 JOB 11122AB3- 000-02 PAGE-002 LAMANA
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CITY OF LYNN vs. TERRANCE THOMPSON.

No. 98-P-505.

APPEALS COURT OF MASSACHUSETTS

50 Mass. App. Ct. 280; 737 N.E.2d 475;

September 15, 1999, Argued
October 23, 2000, Decided

PRIOR HISTORY:

Essex, Civil action commenced in the Superior Court Department on May 10, 1996. The case was heard by Robert H. Bohn, Jr., J., on motions for summary judgment.

DISPOSITION: Affirmed.

COUNSEL: Michael J. Akerson for the defendant.

David F. Grunebaum for the plaintiff.

JUDGES: Present: Brown, Laurence, & Gelinas, JJ.

OPINION BY: GELINAS

OPINION:

GELINAS, J. On its application under G.L. c. 150C, § 11, to vacate an arbitrator's award, a judge of the Superior Court granted summary judgment for the plaintiff, city of Lynn, vacating an award reinstating Officer Terrance Thompson to his position on the city's police force. The arbitrator's award had reduced the penalty against Thompson from discharge to a two-week suspension. The Superior Court judgment sustained the city's action in discharging Thompson from the Lynn police department.

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SEQ 020 JOB 11122AB1-000-01 PAGE-003 LAMANA
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We find that Thompson's conduct, resulting in a mentally ill woman's arm being fractured, conduct characterized by the arbitrator as "conduct unbecoming an officer," violated a well defined public policy protecting members of the public from physical harm from public officials. We affirm the judgment of the Superior Court.

We take the facts from the findings of the arbitrator. See *School Comm. of W. Springfield v. Korbut*, 373 Mass. 788, 789, 369 N.E.2d 1148 (1977). Dispatched to the home of the victim, who we shall call E.R., a person with psychiatric problems (the call prompting the officers' visit reported that E.R. had threatened her mother with physical harm and might have to be committed to Arbor Hospital, a psychiatric facility in Jamaica Plain), Thompson and another officer, Steven Anderson, were the first on the scene. They were followed by a supervisor, Sergeant John Karuzis. Once admitted, an altercation developed between the officers and E.R. E.R. was loud and threatening. She initially resisted suggestions that she go to the hospital. After discussion, the sergeant indicated that they were going to take E.R. to a hospital. He mentioned a "pink slip" to E.R.'s husband.[1] E.R.'s husband agreed that E.R. be committed. Seated in a chair in her living room, E.R. was smoking a cigarette; she picked up a

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[1] General Laws c. 123, § 12(a), provides that "a police officer, who believes that failure to hospitalize a person would create a likelihood of serious harm by reason of mental illness may restrain such person and apply for the hospitalization of such person for a ten day period." To "pink slip" a person believed mentally ill denotes this proceeding; the original of the term derives, no doubt, from the color originally assigned to the paper on which the application form was printed.

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SEQ 157 JOB 11122A82-000-01 PAGE-004 LAMANA
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cigarette lighter and some keys. Thompson demanded that she put out the cigarette and that she give up the cigarette lighter and keys. The supervisor ordered that she be handcuffed. The officers surrounded E.R., who was still seated in the chair. Officer Anderson was in the process of handcuffing her right hand. At this time, Thompson seized E.R.'s left hand and raised it to a straightened position over her head. With his other hand he attempted to pry open her fingers, bending her arm back and twisting it with his other hand until the arm broke. In testimony credited by the arbitrator, E.R. said that, as her arm was bent back, she screamed that she was being hurt and would do whatever the officers wanted; she begged the officer to stop, but he did not. The arbitrator found that Thompson was not trying to place a handcuff on E.R. and that E.R. was not physically threatening the officers with the keys and lighter. It was the second time Thompson had broken a person's arm while taking a person into custody in the course of his police duties.

Two separate legal actions resulted from the incident. E.R. filed suit in Federal court against both the city and Thompson, alleging violation of 42 U.S.C. § 1983.[2] The suit was resolved prior to trial; the city agreed to pay E.R. $350,000 in settlement of all claims, including claims

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[2] Title 42 U.S.C. § 1983 (1994) provides in pertinent part as follows: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . or other proper proceedings for redress."

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Q 022 JOB 11122AB1-000-01 PAGE-005 LAMANA
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against Thompson individually. In settling, neither the city nor Thompson admitted liability.

In addition to E.R.'s Federal suit, the city brought disciplinary proceedings against Thompson which resulted in his discharge.

The city charged Thompson as follows:

> "1. On the night of September 15, 1993, you did violate Section (G)(5) of the Rules and Regulations of the Lynn Police Department by use of more physical force than that which was necessary to accomplish a proper purpose in your attempt to handcuff [Ms. E.R.], such force resulting in injury to [Ms. E.R].
>
> "2. On and after September 15, you did violate Section (F)(6) of the Rules and Regulations of the Lynn Police Department in that you did fail to fully cooperate in a departmental investigation into the facts and circumstances surrounding [Ms. E.R.]'s injury on September 15, 1993.
>
> "3. On and after September 15, 1993, you did violate Section (G)(2) of the Rules and Regulations of the Lynn Police Department and did engage in conduct unbecoming an Officer by virtue of the acts and events involving your injury of [Ms. E.R.] referred to above and your subsequent conduct in reporting the events and providing information during the investigation of these events."

A hearing officer, designated by the mayor in accordance with G.L. c. 31, § 41, sustained all three charges, ruling in part that "[v]iolations of . . . the [r]ules . . . have caused injury to citizens," and recommended discharge. In his report, the hearing officer considered the prior

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incident in which Thompson had broken the arm of an individual whom he was taking into custody. A Federal claim against the city, also brought under 43 U.S.C. § 1983, stemming from that former incident, resulted in a substantial jury verdict against both Thompson and the city.[3] The mayor accepted the recommendation; Thompson was discharged on May 11, 1994.

Arbitration, as provided in the contract between the city and the police union followed. The parties agreed as to the issue: "[W]as there just cause for the discharge of the grievant Terrance Thompson? If not, what shall the remedy be?"[4]

The arbitrator found that Thompson had broken E.R.'s arm in an effort to place her under control and to get objects (keys, a cigarette lighter) out of her hand. The arbitrator further determined that his action in this regard was solely motivated by his concern for removing objects which Thompson considered to be possible

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[3] In Thompson's nineteen-year police career, seven civilian complaints were filed against him. We agree with Thompson that the dispositions of these complaints were such that they could not provide a basis for his discharge: although considered by the hearing officer, they were not considered by the arbitrator. As to the incident resulting in the Federal jury award, Thompson was suspended by the city following a disciplinary hearing. The suspension was reversed after arbitration; the arbitrator did not file a written decision and apparently no appeal was taken.

[4] Article 20, § 1, of the contract between the city and its police officers provided that "[n]o permanent employee [Thompson was a permanent employee] shall be removed, discharged, suspended, or disciplined in any other manner except for just cause."

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weapons, although, as the arbitrator found, E.R. was not using them as weapons and was not threatening anyone with them. The arbitrator also found, based on testimony of Dr. Robert Brendze, an orthopedic surgeon testifying on Thompson's behalf, that E.R. had used steroids, which may have weakened her bone structure, so that "it was likely that bone loss [had occurred and] affected the fracture threshold." Based on the circumstances of the incident and the bone condition, the arbitrator concluded that there was serious doubt that it was the use of excessive force that caused E.R.'s arm to break. He found that the evidence did not support the conclusion that Thompson had lost his self-control and intended to harm E.R. or the conclusion that Thompson had used excessive force in violation of the department's regulations.

The arbitrator further found that, contrary to the hearing officer's conclusion, the charge of failure to cooperate with the police department's internal investigation was not supported by evidence introduced at the arbitration hearing and, in fact, Thompson had complied with all department requirements in the course of the inquiry.

As to the charge of conduct unbecoming an officer, the arbitrator agreed with the hearing officer and found that Thompson's handling of E.R. in the circumstances was "lacking in sensitivity." He further found "overall confusion as [to] the Police Department's role in the involuntary commitment of [E.R.]." Although finding that Thompson had violated the department's rules by engaging in conduct unbecoming an officer, the arbitrator found no just cause for discharge and converted the discharge to a two-week disciplinary suspension.

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There is a "strong public policy favoring arbitration." *Plymouth-Carver Reg. Sch. Dist. v. J. Farmer & Co.*, 407 Mass. 1006, 1007, 553 N.E.2d 1284 (1990). See *United Steelworkers v. Warrior and Gulf Nav. Co.*, 363 U.S. 574, 578, 80 S. Ct. 1347 (1960) (discussing importance of arbitration in labor relation setting). *International Bhd. Of Elec. Workers, Local 97 v. Niagara Mohawk Power Corp.*, 143 F.3d 704, 714-715 (2d Cir. 1998) (reviewing strong policy favoring arbitration in labor matters). Our Legislature has codified that public policy with regard to agreements between labor and management in G.L. c. 150C, §§ 1 et seq., which provides, in § 1, that agreements for arbitration shall be "valid enforceable, and irrevocable."[5]

Reflective of this strong public policy favoring arbitration, judicial review of arbitration awards is severely limited. *Massachusetts Hy. Dept. v. American Fedn. of State, County & Mun. Employees, Council* 93, 420 Mass. 13, 15-16, 648 N.E.2d 430 (1995). See *Concerned Minority Educators of Worcester v. School Comm. of Worcester*, 392 Mass. 184, 187, 466 N.E.2d 114 (1984). Courts may not vacate an arbitrator's award even if the award is based on an error of fact

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[5] The statute provides as follows: "A written agreement or a provision in a written agreement between a labor organization or organizations, as defined in subsection (5) of section two of chapter one hundred and fifty A, and an employer or employers or association or group of employers to submit to arbitration any existing controversy or any controversy thereafter arising between parties to the agreement, including but not restricted to any controversy dealing with rates of pay, wages, hours or other terms and conditions of employment of any employee or employees, shall be valid, enforceable and irrevocable, except as otherwise provided by law or in equity for the revocation of any contract." G.L. c. 150C, § 1, inserted by St.1959, c. 546, § 1.

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or of law. *Greene v. Mari & Sons Flooring Co.*, 362 Mass. 560, 563, 289 N.E.2d 860 (1972). *School Comm. of Waltham v. Waltham Educators Assn.*, 398 Mass. 703, 705, 500 N.E.2d 1312 (1986). "[T]he judiciary must be cautious about overruling an arbitration award." *E.I. DuPont de Nemours & Co. v. Grasselli Employees Indep. Assn. of E. Chicago*, 790 F.2d 611, 615 (7th Cir.), cert. denied, 479 U.S. 853, 93 L. Ed. 2d 120, 107 S. Ct. 186 (1986). "An arbitrator's result may be wrong; it may be unsupported; it may appear poorly reasoned; it may appear foolish. Yet, it may not be subject to court interference," *Delta Air Lines, Inc. v. Air Line Pilots Assn., Intl.*, 861 F.2d 665, 670 (11th Cir. 1988), cert. denied, 493 U.S. 871, 107 L. Ed. 2d 154, 110 S. Ct. 201 (1989), because "the parties bargained for [the arbitrator's] final interpretation of their collective bargaining agreement. [The parties] got what they bargained for." *Cape Cod Gas Co. v. United Steelworkers of America, Local 13507*, 3 Mass.App.Ct. 258, 261, 327 N.E.2d 748 (1975), quoting from *Greene v. Mari & Sons Flooring Co.*, 362 Mass. 560, 289 N.E.2d 860.

General Laws c. 150C, § 11, enumerates the sole grounds upon which an arbitrator's award may be judicially set aside, *Massachusetts Hy. Dept.*, 420 Mass. at 15-16, and of those enumerated grounds only the public policy exception has relevance here. *Id.* at 16. Because generally parties may not enter into contracts which are against public policy, arbitrators may not "award relief of a nature which offends public policy." *Lawrence v. Falzarano*, 380 Mass. 18, 28, 402 N.E.2d 1017 (1980), quoting from Eager, The Arbitration Contract and Proceedings § 121.6 (1971). Any award offending public policy

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"exceeds the powers" of the arbitrator and thus contravenes G.L. c. 150c, § 11(a)(3).[6] The award, moreover, need not violate any positive law, i.e., conduct which is specifically contrary to some statute, regulation, or other manifestation of positive law; it is "available when the arbitration decision and award create an explicit conflict with an explicit public policy," *Service Employees Intl. Union, Local 36 v. City Cleaning Co.*, 982 F.2d 89, 92 (3d Cir. 1992), which includes "the stated purposes behind these rules and prohibitions." *Exxon Shipping Co. v. Exxon Seamen's Union*, 993 F.2d 357, 363-364 (3d Cir. 1993). See *W.R. Grace & Co. v. Local Union 759, Intl. Union of United Rubber, Cork, Linoleum & Plastic Workers*, 461 U.S. 757, 766, 103 S. Ct. 2177, 76 L. Ed. 2d 298 (1983). Any award in arbitration that is offensive to public policy is thus subject to being vacated by the courts.

Following Federal case law, Massachusetts uses a three-prong test to determine whether an arbitrator's award reinstating an employee may be overturned on public policy grounds. *Massachusetts Hy. Dept.*, 420 Mass. at 16-19. First, the public policy "must be well defined and dominant, and is to be ascertained 'by reference to

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[6] General Laws c. 150C, § 11(a), provides in pertinent part:

"Upon application of a party, the superior court shall vacate an award if: . . .

"(3) the arbitrators exceeded their powers or rendered an award requiring a person to commit an act or engage in conduct prohibited by state or federal law."

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the laws and legal precedents and not from general considerations of supposed public interests.' " *Id.* at 16, quoting from *W.R. Grace & Co.*, 461 U.S. at 766. Second, the conduct cannot be "disfavored conduct, in the abstract," but rather, the conduct must be "disfavored conduct which is integral to the performance of employment duties" (emphasis original). *Massachusetts Hy. Dept., supra* at 17, quoting from *Delta Air Lines, Inc.*, 861 F.2d at 671. Third, there must be "a showing that the arbitrator's award reinstating the employee violates public policy to such an extent that the employee's conduct would have required dismissal," *Bureau of Special Investigations v. Coalition of Pub. Safety*, 430 Mass. 601, 605, 722 N.E.2d 441 (2000), that is, where "the job itself makes the employee's conduct an immediate threat to the general public." *Massachusetts Hy. Dept., supra* at 18.

We inquire, then, whether the arbitrator in this case has acted against public policy in reinstating an officer who has twice broken the arms of citizens with whom he was dealing in the performance of his duties, the last incident characterized as "conduct unbecoming an officer," and whose actions resulted in claims against him and his employer in Federal court for violations of 42 U.S.C. § 1983. To discern public policy "we must look at what the people have done on this subject through their elected representatives." *Delta Air Lines, Inc.*, 861 F.2d at 672. There appears a well defined and dominant public policy protecting members of the public from injury by police and other public officials. Title 42 U.S.C. § 1983 (1994), establishes a remedy against anyone acting "under color of any statute, ordinance, regulation, custom, or usage, of any State" who violates the civil rights

SEQ 029 JOB 11122AB1-0X0-01 PAGE-012 LAMANA
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of any citizen or other person. Cases brought under this statute often involve the use of force by police that results in injury to citizens. See, e.g., *Napier v. Windham*, 187 F.3d 177 (1st Cir. 1999); *Barber v. Guay*, 910 F.Supp. 790 (D. Me. 1995); *Medeiros v. Dracut*, 21 F.Supp.2d 82 (D. Mass. 1998). The city has an affirmative duty to act with reasonable care to prevent harm caused by its police, see *Irwin v. Ware*, 392 Mass. 745, 759, 467 N.E.2d 1292 (1984), and liability under G.L. c. 258, § 2, will result where the city fails to act reasonably.[7] The city, as do most communities, has regulations prohibiting unwarranted behavior that results in serious injury to members of the public.[8] These statutes, cases, and rules evince, with respect to police activity, a broad, well defined and dominant public policy of providing protection to citizens. The policy is especially pronounced where one party is, by reason of infirmity, in an especially vulnerable condition. See, e.g., G.L. c. 19C, §§ 1-12 (abuse of disabled persons); G.L. c. 30, § 9B (abuse of person with disability in the care of Commonwealth as mentally ill, mentally retarded, or otherwise).

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[7] We recognize that G.L. c. 258, § 10(c), precludes liability on the part of public employers for the intentional torts, including assault and battery, of their public employees. Nothing in the findings of the arbitrator or in this record suggests anything other than that E.R.'s injury was caused by conduct unbecoming an officer, that is, his insensitive handling of a person exhibiting signs of mental illness.

[8] Rule G(5) of the rules and regulations of the city's police department prohibits "the use of more physical force than that which is necessary to accomplish a proper police purpose."

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SEQ 030 JOB 11122AB1-000-01 PAGE-013 LAMANA
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In his findings, the arbitrator credited the testimony of the victim and others that the victim was not attempting to use the articles in question as weapons and that, in fact, she had ceased to resist and was prepared to comply in all ways with the officer's requests. He further determined that, because of the confusion, the officer may not have been aware of her lack of resistance, crediting police testimony that they did not hear the victim's statements that they were hurting her and that she would cooperate with them. We do not challenge these findings. The arbitrator determined that the victim's arm was broken by the officer, not in an attempt to handcuff her, but in an attempt to remove items from her hand, after E.R. had ceased to resist, while each arm was being held by a different officer, and in the presence of a supervisor. The conduct, resulting in a broken arm, the arbitrator concluded, lacked sensitivity and was conduct unbecoming an officer in violation of rule G(2) of the department's rules.[9]

On the prior occasion when Thompson had been subject to disciplinary action for breaking another person's arm, an arbitrator dismissed, without written decision or comment, a disciplinary suspension. Trial in Federal District Court followed, with the jury finding both Thompson and the city of Lynn to be in violation of 42 U.S.C. § 1983. The jury in that case found that

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[9] Defining such conduct, rule G(2) of the rules and regulations of the police department, provides that "[a]ny specific type of conduct which reflects discredit upon the member as a police officer, or upon his fellow officers, or upon the police department he serves," is "prohibited or restricted."

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Thompson had used excessive force and awarded the victim punitive damages against Thompson in the amount of $300,000.[10]

In circumstances such as these, where the conduct went "to the heart of the worker's responsibilities," *United States Postal Serv. v. American Postal Workers Union*, 736 F.2d 822, 825 (1st Cir. 1984), the city may not bargain away its affirmative duty to prevent harm to others caused by its police. Were it permitted to do so, it would be derelict in its duty to protect members of the public. Public policy precludes a contract which permits an arbitration award preventing discharge here, and thus the arbitrator's award was beyond his power. G.L. c. 150C, § 11(3).

While the arbitrator's decision, by its terms, does not encompass conduct that violates any statute, rule, or regulation, it permits the continued presence on the police force of someone whose past and current conduct permits a strong inference that members of the public will be placed at risk of serious physical harm by an individual whose conduct is unbecoming an officer. The city should not be compelled to reinstate an individual who has, in the rather routine situation of this case, failed to exercise restraint and judgment in determining appropriate conduct for a police officer and where his conduct has resulted in serious injury.

The arbitrator's findings indicate that the conduct occurred in the course of, and was directly related to, the

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[10] The jury's total damage award against both defendants was $100,000, later reduced to $50,000.

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officer's employment duties. We determine that two incidents of like nature, resulting in serious injury to members of the public, suffice to show that Thompson's continuing as a police officer poses a special risk of violent injury to the public and that the city-employer has been, and will continue to be, made "an accessory to the wrongdoing." *Delta Air Lines, Inc.*, 861 F.2d at 671. This result here is not warranted; public policy considerations act to prevent such a result.

We are less persuaded by the city's arguments concerning the exposure of its citizens to civil liability. With regard to the taxpayer's interest, there is no clearly defined, by statute or otherwise, strong public policy of not subjecting a municipality and its citizens to financial risk in circumstances such as these. Although laudatory, protection of the public treasury in this case is at best a "general consideration of supposed public interest." *Massachusetts Hy. Dept.*, 420 Mass. at 16.

The order allowing summary judgment for the plaintiff, overturning the arbitration award, and sustaining discharge of the officer by the city, is affirmed.

So ordered.

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SEQ 034 JOB 11122AC1-000-02 PAGE-002 LAMANA
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COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss. SUPERIOR COURT
CIVIL ACTION
No. 96-972A

CITY OF LYNN

vs.

TERRANCE THOMPSON

MEMORANDUM OF DECISION

On September 30, 1997, this matter was before the court for hearing on the cross motions of the parties for Summary Judgment. Defendant Thompson's motion was filed in response to the City of Lynn's suit to vacate or modify a January 1996 arbitrator's award ordering the City to rescind its employment termination of Thompson and to reinstate him to the police force. In support of his motion, Thompson argues that there are no genuine issues of material fact, and that the arbitrator's award should be affirmed.

In opposition to Thompson's motion, and in support of its position, the City has filed a cross-motion for summary judgment, seeking to vacate and/or modify the Arbitrator's Final Award. In addition, through its complaint and the motion for summary judgment, the City seeks declaratory judgment as to whether it has the right, as a management prerogative, to make employment decisions regarding public safety.

For the reasons discussed below, defendant's motion for summary judgment will be denied. The City's motion for summary judgment on its complaint to modify the

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arbitrator's award will be *allowed*. The motion of the City for a declaratory judgment will be *denied*.

FACTS

The basic facts appear to be undisputed. Defendant Thompson was hired as a police officer by the City of Lynn in or around 1974. On September 15, 1993, while the defendant was attempting to subdue and handcuff an agitated woman who required psychiatric hospitalization, the woman's arm was broken.

As a result of the September 15, 1993 incident, Thompson was charged with violating three regulations of the Lynn Police Department. Specifically, he was charged with using more physical force than necessary, with failing to cooperate fully in the departmental investigation of the facts and circumstances surrounding the September 15 incident, and with engaging in conduct unbecoming an officer.[1]

Following administrative hearings, the Mayor of Lynn agreed with the hearing officer's finding that Thompson had violated all three regulations, and Thompson was subsequently discharged from the Police Department on May 11, 1994.[2]

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[1] The defendant was charged with violating Sections g(2), g(5) and g(6) of the Lynn Police Department Rules and Regulations.

[2] Thompson has also been named as a defendant in a federal civil rights action arising under 42 U.S.C.S., § 1983, alleging the use of excessive force.

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The Rules and Regulations of the Lynn Police Department provide that any member of the police force may be punished by dismissal from the force for conviction of conduct unbecoming an officer;[3] however, Article 22 of the City's contract with the Lynn Police Department permits an individual employee to submit to arbitration a grievance involving suspension, dismissal, removal or termination. The contract provides that the decision of the arbitrator shall be final.

On January 8, 1996, following an arbitration proceeding brought pursuant to the collective bargaining agreement between the City and the Police Union, an arbitrator found that Thompson had not used excessive force, but had engaged in conduct unbecoming an officer. The arbitrator replaced the termination ordered by the Hearing Officer with a two-week suspension, and ordered Thompson reinstated to the police force.

Thompson had also been the defendant in a civil rights case in 1992, in which he was accused of breaking an individual's arm by using excessive force to apply handcuffs. A jury awarded damages of over $50,000 against the City in that action, and Thompson received a disciplinary suspension. That suspension, however, was reversed by an arbitrator other than the one involved in this case, and Thompson was reinstated.

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[3] Lynn Police Department Rules and Regulations, g (22) (k)

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DISCUSSION

In deciding a motion for summary judgment, the court must determine whether there are any disputed issues of material fact, and, if not, whether the moving party is entitled to judgment as a matter of law. *Kourouvacalis* v. *General Motors Corp.*, 410 Mass. 706, 715 (1991). As a general rule, courts show extreme deference to an arbitration award, even if it is demonstrated that the arbitrator made an error of fact or law. *School Committee of Waltham* v. *Waltham Educators Assn.* 398 Mass. 703 (1986). There is, however, a limited "public policy" exception to this judicial deference. A court may strike down an arbitration award reinstating an employee where 1) the award violates clearly established public policy; 2) the employee's wrongful conduct was directly related to job activities; and 3) the conduct posed a special risk to the public. *Delta Air Lines* v. *Air Line Pilots Association*, 861 F.2d 665 (1988).[4] See also *Mass. Highway Dept.* v. *Am. Federation of State, County and Municipal Employees, Council 93*, 420 Mass. 13 (1994). Therefore, the court must first determine whether the arbitrator's award reinstating the defendant to the police force violates clearly established public policy. *Delta, supra.*

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[4] In *Delta*, the court struck down an arbitrator's decision to reinstate a pilot who had been discharged for flying while intoxicated. The court held that Delta could not agree to submit to arbitration the question of whether it should allow intoxicated pilots to operate its aircraft, because there was an explicit public policy against permitting pilots to fly when impaired by alcohol. *Delta* at 671.

SEQ 038 JOB 11122AC1-000-02 PAGE-006 LAMANA
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Massachusetts policy regarding termination of a police officer for disciplinary violations has been established both by statute and by legal precedent. The Police Commissioner has the responsibility for decisions regarding reinstatement of an officer for disciplinary violations. The Commissioner "shall have control of the government, administration . . . and discipline of the department." G.L. ch. 41, §98. The Commissioner "has the authority and duty to determine a police officer's fitness to perform his duties." *Nolan v Police Commissioner of Boston*, 383 Mass. 625 (1981). Therefore, by law, the authority to make employment decisions based on disciplinary violations rests with the Police Commissioner.

The analysis does not end, however, with the determination that public policy vests the responsibility for disciplinary terminations with the Police Commissioner. Because courts show great deference to arbitration decisions, the definition of a legitimate public safety exclusion from arbitration must be decided on a case-by-case basis. *City of Boston v. Boston Police Patrolmen's Association*, 8 Mass. App. Ct. 220 (1979). To apply the public policy exception, and overturn an arbitration award reinstating an employee, a court must also find that the employee's discharge was for conduct directly related to his employment duties, and that the conduct posed a special risk to the public. *Mass. Highway Dept. v. Am. Federation of State, County and Municipal Employees, Council 93*, 420 Mass. 13 (1994). Thus, where an employee was found in another employee's car on company premises 'in the presence of marijuana smoke,' and traces of marijuana were found in his own car, the Court upheld an arbitration award reinstating the employee. *United Paperworkers International*

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Union v. *Misco, Inc.*, 108 S. Ct. 364 (1987). Although the employee's conduct violated statutory prohibitions against the use of marijuana, the conduct could not be considered in the context of the public policy exception because it was unrelated to the employee's job duties. *Id.* The Court held that, despite a strong public policy condemning the use of drugs, a company may agree to arbitrate the issue of whether it may continue to employ an individual found guilty of such conduct off the job. *Delta* at 670.

In contrast, in the present case Thompson's conduct occurred in the direct performance of his duties as a police officer, and a member of the public was injured as a result of his conduct. Where there has been a finding of wrongful conduct in the course of employment duties, and that conduct poses a public risk, the public policy exception must be applied because reinstating the employee under such circumstances may make the employer an accessory to any future wrongdoing. *Delta Air Lines* v. *Air Line Pilots Association*, 861 F.2d 665 (1988).

That is [sic] very situation faced by the City of Lynn, which was required to reinstate Thompson to the police force after a similar incident in 1992. By forcing the City to reinstate Thompson, the earlier arbitration award effectively prohibited the City from contesting liability for the present incident. Similarly, by requiring reinstatement, the current arbitration award would make the City an accessory to any future acts of wrongdoing by Thompson in his capacity as a police officer.

In the present case, the public policy exception applies; the arbitrator made a finding of conduct

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unbecoming an officer, the conduct occurred in the course of the officer's employment duties, and the conduct posed a special risk to the public. The court must therefore respect the City of Lynn's public safety concerns regarding reinstatement of an officer who has broken the arms of two citizens while attempting to handcuff them, and whose conduct has resulted in two 42 U.S.C. § 1983 claims against the City, one resulting in a judgment against the City, and one still pending.

Because the arbitrator's award violates the public policy exception, as a matter of law the City is entitled to summary judgment on its motion to vacate that portion of the award ordering the reinstatement of Thompson. The City is not entitled to a declaratory judgment regarding management prerogatives to make public safety decisions, because such decisions must be decided on a case-by-case basis.

DECISION

For the foregoing reasons, the defendant's motion for summary judgment is *denied*. The city's motion for summary judgment is *allowed*, and that portion of the arbitrator's award ordering the reinstatement of Thompson is *vacated*.

/s/ Robert H. Bohn, Jr.
Robert H. Bohn, Jr.
Justice of the Superior Court

Dated: December 31, 1997

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COMMONWEALTH OF MASSACHUSETTS

ESSEX.SS

SUPERIOR COURT
96-972 A NO.

CITY OF LYNN . Plaintiff(s)

V.

TERRANCE THOMPSON . Defendant(s)

SUMMARY JUDGMENT
(MASS. R. CIV. P. 56)

This action came to be heard before the court, Robert H. Bohn, Jr., J. presiding, upon the cross motions of the plaintiff, City of Lynn, and the defendant, Terrance Thompson, for summary judgment pursuant to Mass. R. Civ. P.56, the parties having been heard, the defendant's motion for summary judgment is denied. The court further having found, as to the plaintiff's motion for summary judgment, that there is no genuine issue as to material fact, and that the plaintiff, City of Lynn, is entitled to a judgment as a matter of law.

It is hereby ORDERED that:

the portion of the arbitrator's award ordering the reinstatement of Terrance Thompson is vacated.

Dated at Salem, Massachusetts, this ninth day of January, 1998.

/s/ J. Brennan
Assistant Clerk

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AMERICAN ARBITRATION ASSOCIATION
Voluntary Labor Tribunal
Case No: 11-390-00960-94

THE MATTER OF ARBITRATION BETWEEN:
TERRANCE THOMPSON (GRIEVANT)
AND
CITY OF LYNN

ARBITRATION DECISION AND AWARD

Introduction

The City of Lynn ("City") and Lynn Police Association ("Union") are parties to a Collective Bargaining Agreement ("Agreement"). Under the Agreement, grievances not resolved during the grievance procedure may be submitted to arbitration under the rules of the American Arbitration Association. In the present case a grievance contesting the discharge of the Grievant Terrance Thompson was submitted. The grievance was not resolved at the earlier steps of the grievance procedure. The grievance was then submitted to arbitration.

The grievant Terrance Thompson was represented by Edward P. Reardon, Esq. and Michael J. Akerson, Esq. The City was represented by David F. Grunenbaum, Esq. The parties presented their case in Arbitration before Gary D. Altman, Esq. on November 17, December 22, 1994, February 8, April 14, September 6, and 7, 1995. The parties had the opportunity to examine and cross examine witnesses and to submit documentary evidence. All witnesses were sworn. The parties filed written post-hearing briefs which were submitted to the office of the American Arbitration Association, postmarked, November 30, 1995.

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Issue

The parties agreed to the following issue:

Was there just cause for the discharge of the grievant, Terrance Thompson? If not, what shall the remedy be?

Facts

I. Background

The grievant, Terrance Thompson, was employed as a Police Officer with the City of Lynn for nineteen years until his discharge on May 11, 1994. In particular on February 1, 1994 the City instituted the following the charges against Officer Thompson:

1. On the night of September 15, 1993, you did violate Section (G) (5) of the Rules and Regulations of the Lynn Police Department by use of more physical force than that which was necessary to accomplish a proper purpose in your attempt to handcuff Ms. Elizabeth Raymer, such force resulting in injury to Ms. Raymer.

2. On and after September 15th, you did violate Section (F) (6) of the Rules and Regulations of the Lynn Police Department in that you did fail to fully cooperate in a departmental investigation into the facts and circumstances surrounding Ms. Raymer's injury on September 15, 1993.

3. On and after September 15, 1993, you did violate Section (g) (2) of the Rules and Regulations of the Lynn Police Department and did engage in conduct unbecoming an officer by virtue of the acts and events involving your injury of Ms. Raymer referred to above and your

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> subsequent conduct in reporting the events and providing information during the investigation of these events.

After administrative hearings were conducted, the Mayor of Lynn agreed with the conclusions of a hearing officer, who found Officer Thompson guilty of the three charges. Officer Thompson was discharged from his position on May 11, 1994.

II. Testimony of the Raymer Family Members.

Eric Raymer is married to Elizabeth Raymer and resides with her in an upstairs apartment at 17 Perley Street, Lynn, Massachusetts. Ms. Raymer's mother Elizabeth Harding lives in a downstairs apartment. Mrs. Harding testified that during the day Mrs. Raymer became increasingly agitated about the family dog and different bills for their home. Mrs. Harding stated that Mrs. Raymer was yelling at her and getting angrier and angrier during the course of the day. Mrs. Harding stated that she suggested that her daughter call a doctor but this request was not accepted. Mrs. Harding stated that she then went downstairs to her apartment. Mrs. Harding stated that at one time during the day her daughter came downstairs and was angry and and started yelling at her. but her daughter then left and went back upstairs. Mrs. Harding characterized her daughter as being out of control but not physical and that at no time during the day was she concerned that her daughter would in any way harm her.

Eric Raymer testified that he works during the evenings and he was home attempting to sleep during the day of September 15, 1993. Mr. Raymer stated that he was

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asleep much of the day but in the afternoon he heard a lot of commotion downstairs in his apartment. Mr. Raymer stated that he went down stairs and saw his wife shoving furniture and ranting and raving, saying things like she wanted to chop her mother up and wanted to punch her sister's boyfriend. Mr. Raymer stated that he did not consider his wife comments to be in any way threatening but rather that she needed help calming down. Mr. Raymer stated that he suggested to his wife that she call a doctor to get a tranquilizer.

Mr. Raymer also stated that he eventually convinced his wife to speak to a doctor sometime after 5:00 p.m. Mr. Raymer stated that he spoke with someone from his HMO and they told him that they would have a crisis worker speak to Mrs. Raymer. According to Mr. Raymer, somebody from Arbor Hospital then called and spoke with both him and his wife. The Hospital suggested that Mrs. Raymer should be brought to the Hospital. Mrs. Raymer at this time refused to go to the Hospital. The Hospital called back and told Mr. Raymer that Mrs. Raymer could not be forced to the Hospital against her will. Mr. Raymer stated that the person from the Arbor Hospital told him that they called the Lynn Police and the police told them that they could take her to a local hospital. Mr. Raymer stated that his wife's mood would swing back and forth, at times she would be willing to go to the Hospital and other times she refused.

In the early evening Charles Harding, Mrs. Raymer's brother arrived at the house. Mr. Harding stated that his other sister who lived on the property called him and told him that his mother and sister had been fighting all day. Mr. Harding stated that he arrived at the house and spoke

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with his mother and then went upstairs to see his sister. Mr. Harding stated that when he first saw his sister she was upset and ranting and screaming vulgarities about different matters. Mr. Harding stated that it was unusual for him to be called to the house but that he had not seen his sister so upset and angry. Mr. Harding testified that after speaking with her, he was able to calm her down. Mr. Harding was also present when his brother-in law called the Hospital and his sister spoke with a crises center. After the call, Mr. Harding stated that his sister agreed to go to a hospital. Mr. Harding then went downstairs to tell his mother that everything was under control.

The person from the Arbor Hospital, a psychiatric facility in Jamaica Plain Hospital, then called the Lynn Police Department, at 8:28 p.m., requesting assistance for Elizabeth Raymer. The transcript[1] beginning with the person from the Arbor Hospital begins:

> . . . I received a call about Liz Raymer she is having homicidal ideas towards her mother who lives in the basement of the house. She is being very graphic on how she wants to hurt her mother.
>
> . . . ; she is saying she wants to hurt her mother, she saying she wants to chop her up in pieces. We need to get her in here, the Arbor, were in Jamaica Plain, we need someone out there . . .

The conversation then concerned whether the Hospital would send a "pink paper" before the police would pick up Ms. Raymer to transport her to a Hospital. In the

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[1] Exhibit 1.

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transcript of this call there is no decision at this time as to whether the Lynn Police Department will transport or commit Ms. Raymer to any psychiatric facility. Nonetheless, the Department does dispatch Car 11 to 17 Perley Street to check a woman who said "she was going to kill her mother and cut her up in little pieces". (City #43) Assigned to the squad car dispatched to the scene is Officer Terrance Thompson, and Officer Steven Anderson, his partner.

Mr. Raymer stated that he heard a knock on the door and that two large police officers were present. Mr. Harding was also present with the police. The Lynn Police Officers were Thompson and Anderson. Mr. Harding asked the police who had sent them, and the police did not know and asked whether there was a problem at the house. Mr. Raymer stated that he could not remember what he told the officers at that time. Mr. Harding stated that he told the police of his sister's arguments and that she had agreed to go to a hospital.

According to Mr. Raymer, the Police Officers went upstairs and then came into the living room. Mr. Raymer stated that his wife was sitting on the couch but then moved to a chair further from the door when the officers arrived. Mr. Harding testified that his sister was calm when the officer first arose. Mr. Raymer testified that he had a conversation with his wife who told him that she wanted the police to leave. He then got his wife cigarettes and she lit up a cigarette. Mr. Raymer stated that his wife again started ranting and raving. Mr. Raymer also testified that he may have told the police of his wife's earlier statements that she wanted to kill her mother. Mr. Raymer testified that he heard the police officers radio for

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a supervisor, and a sergeant later arrived at the house. Mr. Raymer testified that his brother who was there when the police first arrived went down stairs to be with Mrs. Harding. Mr. Harding stated that when he went downstairs it appeared as if everything was fine and that his sister agreed to go to a hospital.

Mr. Raymer recalled that the supervisor told him that they were going to take her to Atlantic Care. Mr. Raymer said that there was mention of a pink slip when the supervisor arrived at the house. Mr. Raymer also stated that he said this was fine with him and he then went to call the insurance company and was in the dining room with the sergeant. Mr. Harding had come back upstairs and his sister started yelling and screaming at him so he left to go back downstairs. According to Mr. Raymer, his wife was still objecting to going to the hospital. Mr. Raymer stated that he saw his wife sitting in the chair and the back of the two officers standing beside her. Mr. Raymer stated that he could not see what was happening as the Officers were blocking his view. Mr. Raymer did not hear anyone say "cuff her". Mr. Raymer heard one of the officers say "she spit at me". Mr. Raymer then heard his wife state several times "stop it, I will do what you want" and "you're hurting me". Mr. Raymer then testified that he heard a sickening snap. Mr. Raymer stated that he then observed his wife's arm, which he stated was bent in the wrong place, and that his wife was crying. Mr. Raymer stated that at that time he went to get Charlie Harding.[2]

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[2] Mrs. Harding also came upstairs to aid her ailing daughter.

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Mr. Harding, who was formerly a Salem police officer and a trained EMT, then assisted his sister. Mr. Harding stated that Mrs. Raymer's shoulder was normal but that her arm was bent back wards and her palm was resting on the chair. According to Mr. Raymer, an Officer then called an ambulance and his wife asked Officer Thompson his name and that he replied "Thompson". Mrs. Raymer then said "I am going to sue you". Mr. Raymer testified that Thompson then said, "so what I am being sued already."

Mrs. Raymer testified at the Arbitration hearing that she really did not remember many of the details that occurred on September 15. Mrs. Raymer stated that she was taking two prescription medicines at the time: florinef[3] and and chlomid[4], She recalled that she was arguing with her mother when her mother was present during the day and went downstairs to her mother's apartment to continue her arguing. When her mother was not present, Mrs. Raymer stated that she was ranting and raving about various things during the day. Mrs. Raymer acknowledged that she was using obscene language during the day and that she had verbally stated that she was going to kill her mother but that these were just irrational outbursts and that at no time did she ever physically confront or attack her mother that day. Mrs. Raymer remembered that her husband had attempted to convince her to go to the Hospital and that at times she would

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[3] Mrs. Raymer stated that this was for her High Blood pressure.

[4] Mrs. Raymer stated that this medication was assist to her in becoming pregnant.

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agree to go and at other times she would change her mind and refuse to go the Hospital. Mrs. Raymer also stated that she remembered that she spoke with someone from the Arbor Hospital about going to a Hospital.[5]

Mrs. Raymer recalls that the police appeared in the apartment and that they began talking with her husband and brother. Mrs. Raymer stated that she began screaming at her brother to leave as she was embarrassed at her behavior. Mrs. Raymer testified that she was sitting in a chair in the corner of the living room when the police arrived and that she never left the chair during the entire time the police were present. Mrs. Raymer also testified that at one time she was holding a key chain in her hands and the officers told [sic] she should not have the key chain. Mrs. Raymer testified that she remembered giving the keys to her husband. She recalled that she was chain-smoking during the day. Mrs. Raymer stated that she was smoking when the officers came in the room and her pack of cigarettes and a cigarette lighter were on the table in front of the chair and that she picked these up when the officers were present. Mrs. Raymer also stated that Officer Thompson was smoking and that he was letting the ashes fall on the floor. Mrs. Raymer stated that she told him not to smoke if he couldn't get the ashes off the floor and that he responded "why not you are."

Mrs. Raymer stated that she remembered someone saying she could not smoke since this was a weapon. At about this time she heard someone say "put the cuffs on

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[5] Mrs. Raymer testified that she had a number of years in the past, been hospitalized at the Arbor Hospital for a psychiatric condition.

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her". Mrs. Raymer stated that the officers then rushed towards her. Mrs. Raymer stated that Officer Anderson was to the right of her and Officer Thompson was on her left. She stated that at this time she was sitting in the chair and never got up to leave. She remembered that officer Anderson took away her cigarettes and the lighter that was in her right hand and placed a handcuff on her right wrist and was attempting to lower her arm and put her hand behind her back.

Officer Thompson, Mrs. Raymer stated, had raised her left hand in the air so that it was straight up in the air and he was holding the top [sic] put of her arm with one hand and with his other hand was bending her fingers back in an attempt to open her fist. Mrs. Raymer recalled that her arm was hitting the top of the chair. Mrs. Raymer stated that Officer Thompson's actions were hurting her and that she screamed out to stop that he was going to break her arm. Mrs. Raymer testified that she said several times to stop that she would do whatever they wanted her to do. Mrs. Raymer stated that Officer Thompson was "twisting her arm" and that her forearm finally snapped. Mrs. Raymer stated that her elbow then faced towards the ceiling but her hand was facing towards the floor. After her arm was broken, she then asked Anderson to take off the cuffs. Mrs. Raymer stated that after her arm was broken she had to have twelve different casts put on her arm, she had a bone graft and insertion of plate and screws in her arm to help it heal.

Mrs. Raymer stated that at no time did any of the officers tell her she was under arrest or did they ever communicate the reasons they were trying to subdue her. Mrs. Raymer stated that she did not resist the officers and

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that she did not do anything to hurt the officers. She denies kicking any of the officers and testified that she was sitting in the chair and that the officers were on the side of her and that Officer Anderson was pushing her forward to place the cuffs on her, while at the same time, Thompson was pushing her backwards and that her feet went out straight but that she was not trying to kick the officers. Mrs. Raymer also stated that Officer Thompson first refused to give his name and that when she said to him that she was going to sue them he responded "so what others are already suing him."

III. Testimony of the Officers present at the scene.

A. Officer Thompson

Officer Terrance Thompson was employed nineteen years with the Lynn Police Department at the time of the incident. Officer Thompson testified that on September 15 he and Officer Anderson were dispatched after the Department had received a call from a hospital concerning a mentally distraught person who had threatened to cut up her mother. Officer Thompson stated that they arrived at the house on Perley Street and met first with Mrs. Harding who took them upstairs. Officer Thompson testified that when they arrived at the upstairs apartment, Mrs. Raymer was yelling and screaming that she was going to kill her mother. Mrs. Harding then left the apartment. Officer Thompson testified that Mrs. Raymer was screaming and swearing at her brother, calling him names, and at one time got out of the chair to chase her brother. Officer Thompson stated that Officer Anderson then stood up and Mrs. Raymer bounced off Officer Anderson. Mr. Harding then left the apartment. Officer

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Thompson then called Sergeant Karuzis to ask for advice. Sergeant Karuzis then arrived and the officers and talked about committing Mrs. Raymer to the Hospital. Officer Thompson testified that Mr. Raymer agreed stating that he could no longer handle his wife. Sergeant Karuzis then called an ambulance to take her to the Hospital.

Officer Thompson testified that while they were waiting for an ambulance, Mrs. Raymer was sitting in the chair and picked up a key ring that was on a coffee table in front of the chair and started to take off the keys. Officer Thompson testified that he asked her to put the key ring down. Mrs. Raymer according to Officer Thompson then tossed the keys and key ring over her shoulder. Mrs. Raymer then picked up the keys from the floor. Officer Thompson stated that he asked her to put the keys down, she did not do so and she held them in her hands. Officer Thompson testified that she sat down picked up a cigarettes and lighter with her other hand. Officer Thompson stated that Mrs. Raymer was completely unstable and believed these things could be used as a weapon. As civilians were coming to take her in an ambulance he believed that it was not safe for her to hold these items.

Officer Thompson stated that he stepped over to her to take the items out of her hand. He approached Mrs. Raymer who was first standing and when he approached her she then sat down. According to Officer Thompson, Officer Anderson grabbed her right hand and the keys dropped to the floor. Officer Thompson stated that he grabbed her left hand, which was a closed fist, and that she was resisting opening her hand, he tried to open her fist and got the cigarette lighter. Officer Anderson stated

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that she was kicking him and resisting his effort to open her hand. At that time Sergeant Karuzis ordered them to handcuff Mrs. Raymer. Officer Thompson stated that he never attempted to handcuff Mrs. Raymer, rather his main objective was to get what he believed was the cigarette lighter out of her hand.

Officer Thompson stated that once she dropped the items out of her hand he then brought her hand down from the upright position. Officer Thompson stated that during this time Mrs. Raymer was yelling and screaming that she was not going to go and that she was not going without a fight. Officer Thompson stated that Mrs. Raymer's arm was bent at the elbow and her wrist was below the elbow and that he had one hand on her arm below the elbow and another hand on her wrist. During this time, she was kicking out with her legs and wriggling around in the seat. Officer Thompson stated that Mrs. Raymer's arm twisted and that she then screamed out that her arm was broken. Officer Thompson testified that at no time did he hear Mrs. Raymer yell out to stop or that he was breaking her arm. Officer Thompson said that it was an accident and that both Mrs. Raymer and Mr. Harding also said that the entire matter was an accident.

Officer Thompson testified that he prepared a report about an hour and a half after the incident. The report that Officer Thompson wrote had spelling and grammatical mistakes. Officer Thompson stated that Deputy Suslack told him a couple of days later to prepare another report but then told him not to do so.

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Officer Thompson's past employment was introduced at the arbitration hearing. Officer Thompson stated that there have been civilian complaints filed against him and that they were all dismissed as being unfounded. The record shows that there was one civil rights action brought against the City and Officer Thompson and that after a trial a Federal District Court jury returned a verdict that Officer Thompson was found guilty of using excessive force. Officer Thompson was also suspended for fifteen days for this incident. This matter also went to arbitration and the discipline imposed against Officer Thompson was reversed.

B. Officer Anderson

Officer Steven Anderson has been employed at the Lynn Police Department since 1978. Officer Anderson testified that he and Officer Thompson were dispatched to the Raymer house on September 15, 1993. They got to the house and first met Mrs. Harding who told them that her daughter had been acting "crazy" all day. They then went upstairs. Officer Anderson stated that when they arrived Mr. Raymer was in the love seat and Mrs. Raymer was sitting in the chair. Officer Anderson stated that when they arrived Mrs. Raymer started screaming at Mrs. Harding that she was going to kill her. Mrs. Harding then went downstairs. Officer Anderson, according to his testimony and a report that he filled out after the incident, stated that Officer Thompson first tried to speak with Mrs. Raymer about going to a hospital but she stated that she was not going to go. Officer Anderson stated that Officer Thompson asked him to call for Sergeant Karuzis

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who later arrived at the apartment. Officer Anderson stated that Mrs. Raymer began screaming at Mr. Harding, and lunged after him. Officer Anderson stated that he stood in the way and Mrs. Raymer went back to the chair and Mr. Harding then left the apartment.

Officer Anderson wrote in his report[6] that sergeant Karuzis decided that it was necessary that commitment papers for Mrs. Raymer be filled out. Officer Anderson stated that he saw Mrs. Raymer throw something behind the chair, and then "leaned over behind the chair she brought her left hand up with something metallic in her hand". Officer Thompson remembered that Officer Anderson told her not to pick it up. Officer Thompson grabbed her left hand. This was about a "second and a half" before Sergeant Karuzis directed them to hand cuff Mrs. Raymer. Sergeant Karuzis then told Officer Anderson to handcuff her." According to Officer Anderson, Mrs. Raymer began kicking and spitting and striking both himself and Officer Thompson. Officer Anderson stated that he was cuffing Mrs. Raymer's right hand, which was down by her side at the time. He believed that at this time Officer Thompson was attempting to cuff Mrs. Raymer's left hand and that during this time Mrs. Raymer was kicking and thrashing about in the chair. Officer Anderson stated that there was a lot of commotion in the house and that he never heard Mrs. Raymer telling them to stop, that she would do what they wanted her to do. Officer Anderson then heard Officer Thompson state that he broke her arm. According to Officer Anderson, Mrs. Raymer then sat back in the chair. Officer

[6] Officer Anderson's report is City Exhibit 9.

Anderson stated at the arbitration hearing that he was not threatened by or afraid of Mrs. Raymer's behavior that evening.

C. Sergeant Karuzis

John Karuzis has been a sergeant with the Lynn Police Department since 1977.[7] Sergeant Karuzis stated that he was the one that answered the call for assistance from Officer Anderson and Thompson. Sergeant Karuzis testified that he went up to the apartment and saw Officers Anderson and Thompson in front of Mrs. Raymer who at that time was pacing back and forth in the room, waving her arms, and screaming at the police. Sergeant Karuzis spoke with Officer Thompson who told him that Mrs. Raymer had stated that she was going to chop her mother up and place her in little pieces. Sergeant Karuzis stated that he spoke with Mrs. Raymer and attempted to see if she would control herself. Sergeant Karuzis stated that the second time he asked Mrs. Raymer to control herself, she took a seat in the chair in the corner of the room. Sergeant Karuzis testified that he then called the station and requested an ambulance to take her to the Hospital.

Sergeant Karuzis stated that Mrs. Raymer sat down and picked up a metallic object off the table. Sergeant Karuzis stated that at that time he directed the Officers to cuff Mrs. Raymer. Sergeant Karuzis stated that he directed the officer to cuff her because he saw her grab

[7] Sergeant Karuzis was promoted to a lieutenant after the present incident.

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things off the table.[8] Sergeant Karuzis stated that he was concerned about her safety and that he did not want her to injure anyone else. Sergeant Karuzis further testified that he believed that it was appropriate to pink paper Mrs. Raymer due to her mental condition. Sergeant Karuzis testified that Mrs. Raymer's fists were clenched and the the Officers were trying to open Mrs. Raymer's fist. Sergeant Karuzis also testified that Mrs. Raymer was kicking her feet out when the officers approached her. Sergeant Karuzis believed that Mrs. Raymer's feet may have kicked the officers as they approached her.

Soon after his directive to cuff her, Sergeant Karuzis stated that Mr. Raymer came to him and told him that some one from the Hospital was on the phone and wanted to talk to Karuzis. Sergeant Karuzis went to the phone in the kitchen and was talking with someone from the Hospital when he then heard screaming from the other room and he hung up and went to the living room where he saw Mrs. Raymer sitting in the chair holding her arm. Sergeant Karuzis testified that a call was made to speed up the ambulance and that he then reported the incident to the Department. Sergeant Karuzis stated that Officer Thompson spoke with him and stated that he could not believe that it happened, as he was not using much force on her.

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[8] Sergeant Karuzis stated that he was not sure whether it was an ashtray or cigarette lighter.

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IV. Testimony of the Doctors

Dr. Peter Mulhern is an Orthopedic Surgeon and treated Ms. Raymer after she was admitted to the Hospital.[9] Dr. Mulhern stated that Ms. Raymer suffered a "fractured left humerus shaft." Dr. Mulhern testified that Mrs. Raymer's arm could not be set without surgery, which was performed at a later date. Dr. Mulhern stated that simply by viewing the X-rays he could not be certain which position Mrs. Raymer's arm was in when it was broken nor how Mrs. Mrs. Raymer's arm was rotated by the officer who broke her arm. Dr. Mulhern stated that it "could not have been done by simple motion downwards" but "that it could be broken if there was enough force in the movement." He also stated that it was "possible moving the arm back could cause the injury". Dr. Mulhern did state that the "arm was not broken in an attempt to get it behind her back".

Dr. Mulhern further testified that it was impossible to measure the amount of force used but that Mrs. Raymer's "resistance could affect the outcome." Dr. Mulhern stated that Mrs. Raymer was at the time taking medication for osteoporosis and that this medication has been known to cause brittle bones but that this occurs more often with the elderly. Dr. Mulhern stated that there was nothing seen in Mrs. Raymer's X-rays nor her exams that she suffered from osteoporosis.

Dr. Robert Brendze a specialist in Orthopedic Surgery was called by the grievant in the present case. Dr.

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[9] Dr. Mulhern, testified via conference call at the arbitration hearing.

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Brendze is faculty member at the Harvard Medical School and has appointment privileges at Massachusetts General Hospital and other local hospitals.[10] Dr. Brendze reviewed Mrs. Raymer's past medical history[11] prior to his testimony. Dr. Brendze testified that Mrs. Raymer was taking two medications at the time of the incident. One of the drugs, Dr. Brendze, stated is a synthetic steroid "that is designed to minimize one hormones". Dr. Brendze stated that Mrs. Raymer's prior medical records show that from the period of March to May 1988 she was also prescribed pergnozone, another steroid. Dr. Brendze stated this Mrs. Raymer was prescribed 20 milligrams, three times a day for a seven week period, which according to Dr. Brendze is a very high concentration of this medication for a very long period of time. According to Mrs. Raymer's medical records, this medication was stopped very abruptly, which Dr. Brendze testified also can cause deterioration of a person's bone structure. Moreover, Dr. Brendze testified that the effects of these types of steroids are that they contribute to a loss of bone mass, which may or may not ever be regained by the person. Dr. Brendze stated that one of the effects of these steroids is that they diminish bone mass and make bones more susceptible to fractures.

Dr. Brendze also reviewed the X-rays of Mrs. Raymer's arm fracture caused by Officer Thompson. Dr.

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[10] Dr. Brendze's three page resume was submitted into evidence. There is no question that he is an expert in Orthopedic surgery.

[11] The Medical History provided to Dr. Brendze began in 1988.

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Brendze stated that it was impossible to determine where Mrs. Raymer's arm was at the time of the break. Dr. Brendze stated that the fracture was caused by a twisting nature and based on how the arm could be moved if it was down, as opposed to it being up in the air, "one would have to conclude that the arm was down when it was broken." Dr. Brendze stated that it was likely that there was rotary movement by both Officer Thompson and Mrs. Raymer. Dr. Brendze also testified that a review of Mrs. Raymer's X-rays after the incident showed that there was thinning of the cortex of the bone, "which suggests a decrease in bone structure". Dr. Brendze stated that because of Mrs. Raymer's "history of steroid usage in the past that it was likely that bone loss affected fracture threshold".

Events after September 15, 1993

Deputy Chief John Suslack learned of the incident and assigned Captain Joseph Rowe to investigate. Captain Rowe testified that he reviewed the phone transcript and the radio log and then decided to interview those persons directly involved with the incident. Captain Rowe stated that he and Lieutenant Carter then conducted interviews. The first interview was with Mrs. Harding on the afternoon of September 16 at approximately 1:15 p.m. at Mrs. Harding's apartment. Captain Rowe stated that Mrs. Harding recalled the events of the previous day and told the Officers about Mrs. Raymer's current medical condition and previous hospitalization for mental illness a number of years ago. A written report

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was prepared by Lieutenant Robert Carter of the interview. (City exhibit 14)[12]. Captain Rowe and Lieutenant Carter next spoke to Charles Harding. As with Mrs. Harding, questions were asked and Lieutenant Carter prepared a written statement. (City exhibit 16).[13]

Captain Rowe stated that at approximately 6:00 p.m. he went to the Hospital to interview Elizabeth Raymer. At 6:30 he went to Mrs. Raymer's room. Mrs. Raymer was sleeping and the nurse woke her. Mrs. Raymer told Captain Rowe that her brother told her not to speak with anyone until she first spoke with him. Captain Rowe then asked the nurse attending Mrs. Raymer whether Mrs. Raymer was on any medication that would prevent Mrs. Raymer from understanding his questions. Captain Rowe stated that the nurse said that there was no problem with him speaking to her. Captain Rowe stated that he told Mrs. Raymer to call her brother and that he would return.

Captain Rowe stated that he left Mrs. Raymer's room and in the meantime spoke with the charge nurse to

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[12] A review of this statement shows it to be consistent with Mrs. Harding's testimony at the arbitration hearing. Mrs. Harding in this interview did tell the officers that "Elizabeth was really different this time, she was really angry and a little out of control, but she said if you leave her to herself she will be Ok."

[13] In Lieutenant Carter's statement, Mr. Harding indicates that Mrs. Raymer was still mad when he went downstairs to talk to his mother. Mr. Harding does not indicate that when the officer first arrived that Elizabeth had agree to go to the Hospital. Mr. Harding also stated that "Elizabeth had threatened his mother and sister . . . and that she was going to stab them while they were sleeping."

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inquire of Mrs. Raymer's specific medications. According to Captain Rowe, the charge nurse told him that Mrs. Raymer was not prescribed morphine, codeine, or similar substances. Captain Rowe stated that the nurse stated Mrs. Raymer was not on any such medication. Captain Rowe then saw Mrs. Raymer who described to him the events of the night before. (City Exhibit 15). Mrs. Raymer gave the following statement with reference to Officer Thompson:

> [He] grabbed my left hand up in the air with one of his hands and then grabbed my left forearm with his other hand. When he did this I thought he was going to break my hand so I said Stop! Stop! You are going to break my arm. I'll put them on. I'll do what you want. I was going to put my hand back like he wanted. The next thing he pushed my arm and it snapped. He broke my arm. . . .

Mrs. Raymer stated to Captain Rowe that she wanted a cigarette and that Officer Thompson would not let her do so as it "was a weapon". Mrs. Raymer stated that she did pick up her cigarette and lighter but she never threatened anyone with them. In this interview Mrs. Raymer acknowledged that she told the officers at the time that "she was not going without a fight," and that the officers were "not taking her anywhere". Mrs. Raymer, also stated that she "tried to break free." Mrs. Raymer in Captain Rowe's first statement, stated that she never attempted to strike any of the officers nor did she try and kick them. Captain Rowe testified at the arbitration hearing that Mrs. Raymer during the interview was uncomfortable due to the pain but answered the questions without any

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difficulty and that he – found Mrs. Raymer to be candid and forthcoming.

Mrs. Raymer stated at the Arbitration hearing that she had a vague recollection of Captain Rowe appearing at the Hospital on September 16, sometime in the afternoon. She testified that she remembered that Captain Rowe was with another officer.[14] Mrs. Raymer stated that her husband had left the hospital at around 4:00 p.m. and prior to his leaving, she had requested morphine for her pain. Mrs. Raymer stated that she remembers telling him that her brother said to call him before she spoke with anyone and that she attempted to call him but he was not at home. She spoke with her husband who told her that she could talk with Captain Rowe. Mrs. Raymer then testified that she was afraid and did not want to talk to him but that he told her she had no choice. Mrs. Raymer stated that she could not recall any of the details of the interview and that she did not remember how long she spoke with him. She stated that she told Captain Rowe that she could not think straight several times during the interview.

Mr. Raymer stated that Captain Rowe did speak with him on September 16, 1994. (City ex. 17) In this interview Mr. Raymer recounted what happened the day before and how Officer Thompson broke his wife's arm after his wife said "all right Ill put my hand behind my back". Mr. Raymer stated that he could not see the incident because he was shielded by the back side of the two officers. In

[14] Captain Rowe came by himself on September 16.

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this interview Mr. Raymer did not recall any of the officers state "cuff her" nor that he ever saw handcuffs taken out by any of the officers. Mr. Raymer also told Captain Rowe his wife's current medication.

Captain Rowe stated that he called Mr. Raymer on September 19 for him to review the statement that Captain Rowe had typed up. Mr. Raymer stated that after September 16, the family consulted with a lawyer and he later told Captain Rowe that under advice of counsel he would not speak with him nor would he review a copy of the typed statement that Captain Rowe had prepared from his earlier interview.[15] Captain Rowe also stated that on September 19, Mr. Harding called and told him that Mrs. Raymer would be filing a complaint against the Department.

Captain Rowe testified that he scheduled a second interview with Mrs. Raymer for October 3, 1994. Captain Rowe stated that also present at the Raymer house with Mrs. Raymer were two attorneys. Captain Rowe stated that the attorneys stated that they wanted to talk privately with Mrs. Raymer prior to his speaking with her. The attorneys would not permit Captain Rowe to ask questions but agreed only that Mrs. Raymer could essentially provide a narrative version of the incident. (City exhibit 42) Captain Rowe stated that in this subsequent interview Mrs. Raymer did not remember meeting with him at the Hospital on the day after the incident. Captain Rowe stated that otherwise Mrs. Raymer's version

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[15] Captain Rowe on October 10, did go the Raymer house to take pictures and measurements of the room.

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"although the details were not as fresh", was generally consistent with her first statement".

Captain Rowe also interviewed Officers Thompson, Anderson and Sergeant Karuzis.[16] All the interviews and exhibits were reviewed by Deputy Suslack. Deputy Chief Suslack testified that he viewed Officer Thompson's reports to be inaccurate and concluded that he failed to cooperate and was not forthcoming in the Department's investigation. Deputy Chief Suslack[17] also testified that Officer Thompson's' efforts to handcuff Mrs. Raymer were totally inappropriate.[18]

Position of the Parties

Position of the City

The City contends that there was just cause for the discharge of the grievant, Terrance Thompson from his position as a Lynn Police Officer. The City maintains that there are several reasons that, when added together, demonstrate that Officer Thompson can no longer be trusted to perform the duties of the position without being a threat to the citizens of Lynn and without placing the City

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[16] These reports were submitted into evidence and have been reviewed and where appropriate will be mentioned in the body of the opinion.

[17] Deputy Chief Suslack also served as the training officer for the department. Officer Thompson' training record was introduced into evidence.

[18] Lieutenant Richard Wells from the Milton Police Department testified about various handcuffing techniques. His testimony will not be reviewed in this decision. In particular he was not present at the scene and could not testify with any knowledge of the events that occurred at the scene.

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at risk of future civil lawsuits. In support of its position the City points to the circumstances of the present occurrence and Officer Thompson's past employment record.

The City argues that Officer Thompson's actions on the night in question precipitated the incident in which he broke Mrs. Raymer's arm. The City maintains that the situation at the Raymer apartment did not call for any use of any force by the police officers. Specifically, the City argues that there was no legitimate reason why Officer Thompson prohibited Mrs. Raymer from smoking and then confronted her to take objects out of her hand. The City contends that Mrs. Raymer, since she was sitting in a chair, never presented any legitimate threat to any of the family members nor to the officers present. The City asserts that Mrs. Raymer was not under arrest and therefore Officer Thompson had no reason to employ any degree of physical force upon Mrs. Raymer.

The City further argues that once Officer Thompson decided to approach Mrs. Raymer there was no legitimate reason why he had to use force to the extent that caused him to break Mrs. Raymer's arm. The City argues that there was no legitimate reason why Officer Thompson took Mrs. Raymer's arm and placed it in the upright position. The City asserts that this was the wrong position to handcuff someone. Moreover, the City states that Mrs. Raymer was half the size of Officer Thompson and indicated that she was willing to cooperate. The City contends that the evidence suggest that Officer Thompson lost his self control and used more force than necessary because Mrs. Raymer was swearing and spitting at the officers. The City asserts that Police Officers

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are often confronted with obnoxious people and can not initiate confrontations with citizens.

The City argues that this is not the first situation in which Officer Thompson has used excessive force. The City also argues that the employment records of Officer Thompson shows an officer who is unable to control himself in difficult situations. The City further maintains that Officer Thompson did not cooperate in the Department's investigation. The City concludes that it can no longer employ a police officer who can not conform his actions to the Department regulations and therefore there was just cause for his discharge.

Position of the grievant

The grievant maintains that he used no more force than necessary in attempting to restrain Mrs. Raymer and that he fully cooperated with the Department's investigation. The grievant states that they were called to the house on Perley Street where there was a report from a hospital that a mentally unstable women had threatened to kill and cut up her mother. The grievant argues that they were immediately confronted with a mentally unstable woman. The grievant and the other officers attempted to control the situation and to determine the appropriate course of action. The grievant argues that he followed department regulations in seeking advise from a sergeant before taking any action.

The grievant denies that he provoked or exacerbated the situation with Mrs. Raymer. In particular, he argues that it was reasonable to direct the grievant not to hold a

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cigarette or keys in her hand as Mrs. Raymer at times stated that she was not going to go the hospital and that she would go without a fight. Officer Thompson states that an ambulance had been called to take her to the hospital thus it was not unreasonable to direct that she not have anything in her hands that could be used against herself or the persons from the Hospital. The grievant argues that it must be remembered that the through the entire time the police were at the apartment Mrs. Raymer threatened her mother, came after her brother and was emotionally unstable. The grievant argues that Mrs. Raymer's account that she was sitting in the chair and non combative the entire time should not be credited. Moreover, the grievant argues that what must also be considered is that Mrs. Raymer changed her version of what happened and her behavior after her family consulted with an attorney. Thus, the grievant maintains that his decision to approach Mrs. Raymer was not unreasonable when considered with all the circumstances that existed at the time.

The grievant also argues that the physical force that he used upon the grievant was not unreasonable. Officer Thompson asserts that he did not attempt to intentionally hurt Mrs. Raymer and that the physical force that he used was not excessive. Officer Thompson states that did not use much force when he grabbed Mrs. Raymer's left hand to take the objects out of her hand, and had his other hand on her lower arm: Officer Thompson states that it was not unreasonable that he never heard Mrs. Raymer's statement that he was hurting her due to the commotion in the apartment at that time, and that even Officer Anderson, who was next to Mrs. Raymer, stated he did

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not hear Mrs. Raymer say anything. Officer Thompson further maintains that Mrs. Raymer was also exerting resistance and thus it was not just his own force that caused the injury to Mrs. Raymer. Officer Thompson asserts that Dr. Brendze credibly testified that the steroids taken by Mrs. Raymer affected her bone mass and affected her threshold for bone fractures. Thus, the grievant argues that it very is likely that the use of force was not excessive but that the break was caused in part to Mrs. Raymer's reduced bone mass. This fact the, grievant argues, raises substantial doubt that his force was excessive.

The grievant further maintains that the report that he prepared after the incident was complete and accurate. The grievant acknowledges that he made a number of grammatical and spelling mistakes in his report but that the report was prepared shortly after the incident and that he was upset by the occurrence. The grievant states that he was never directed to complete a supplemental report and would have done so if directed. Officer Thompson states that he set forth the pertinent details in the report and answered all questions that were asked during the investigation.

The grievant also argues that it was wrong to base his discharge on past incidents. In particular, the grievant argues that in all previous instances in which there were civilian complaints, after a department investigation he was exonerated of any wrongdoing and no discipline was imposed. The grievant argues that even in the situation in which there was a civil rights verdict, the discipline imposed against officer Thompson was rescinded by an

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arbitrator. Officer Thompson seeks reinstatement and full lost pay and benefits.

Discussion

Officer Thompson was charged with violating three Departmental regulations that the City believed merited his discharge from the Lynn Police Department. The three charges will be now be considered.

I. Unnecessary Force

Officer Thompson was found to have violated Rule (G) (5) of the Lynn Police Department regulations. This provision prohibits officers from engaging in "unnecessary force". Unnecessary force is defined as

> the use of more physical force than that which is necessary to accomplish a proper police purpose.

This provision is further expounded upon in a separate policy on the use of non-lethal force issued on January 1, 1989. This latter provision provides that the use of force "will always be dependent upon the particular circumstances present in each case." Police officers can only use that degree of force reasonable and necessary to overcome the resistance offered and no more."[19]

The Department maintains that there was absolutely no need for any physical force in the present case and therefore Officer's Thompson's attempt to take objects

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[19] This was City exhibit 48.

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from Mrs. Raymer and the manner in which he applied force to Mrs. Raymer's arm was totally unnecessary in the present case. Specifically, the Department maintains that it was Officer Thompson who took the initiative in needlessly confronting Mrs. Raymer and should have never even attempted to approach her. The Department maintains that officer Thompson agitated Raymer and and thus forced the physical confrontation.

It is true that soon after the officers arrived Mrs. Harding had left the apartment. In addition, Mr. Harding had also left the apartment. Thus, the family members who incited Mrs. Raymer's rage and anger were no longer present. Thus, any use of force exerted by the officers to protect the family members could not at this time be justified. The question then is whether the grabbing of Mrs. Raymer's hands by Officer Thompson after the family members left the vicinity was justified. Officer Thompson stated that he saw Mrs. Raymer throw some keys and pick them up and that she was smoking cigarettes and also had a lighter in her hand. Judging the incident, one would certainly have to conclude that Mrs. Raymer did not pose any danger to any persons by picking up these objects, she did not threaten the officers; after all she had been smoking continuously since the officers arrived on the scene. It would certainly have been a prudent course of action to leave Mrs. Raymer with these items at least until the ambulance had arrived at the scene.

On the other hand, a review of the testimony and all the exhibits presented in the case show that the situation at the Raymer apartment on the evening in question can best be described as chaotic. The record shows that

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although the Raymer family may have believed that Mrs. Raymer would not have harmed Mrs. Raymer or any of the family members it was certainly understandable how an outsider to the family had no idea of Mrs. Raymer's so called harmless nature. It must be remembered that the entire incident was precipitated by a call from the Arbor Hospital to the Lynn Police Department that informed the police department that there was a woman who had been very graphic on how she wanted to hurt her mother and chop her up in little pieces. (City exhibit 1) Therefore it was not entirely unreasonable for Officer Thompson to direct Mrs. Raymer to drop the keys and the cigarette lighter.

Even after Mrs Harding and Charles Harding left the apartment, Mrs. Raymer's conduct was still very unstable. By this time it had been decided by Sergeant Karuzis and the officers present that Mrs. Raymer should be involuntarily committed to a hospital. There was no disagreement from Mrs. Raymer's family as to this decision. Indeed, at no time did members of the family suggest to the police that the situation was under control and the police should leave the apartment. The fact that all present believed that Mrs. Raymer should be "pink papered" certainly demonstrates that the officers were not dealing with a person with in control of herself at the time. Moreover, the evidence shows that after a decision had been made to take Mrs. Raymer to the Hospital she clearly indicated that she would not go voluntarily. In particular the evidence shows Mrs. Raymer made statements that she would not go and would not go without a fight.

SEQ 124 JOB 111222AE1- 000-05 PAGE-034 LAMANA
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At the arbitration hearing officer Thompson stated that he was concerned about Mrs. Raymer's safety and also believed that Mrs. Raymer should not be holding these objects since an ambulance had been dispatched to pick up Mrs. Raymer. This was not an opinion held just by Officer Thompson. Indeed, even Sergeant Karuzis believed that it was reasonable that Mrs. Raymer should not possess these objects. In the transcript, of his interview he was asked (City No. 45):

> Q. Sgt. Karuzis, from your report, you read in the report that you told officer Anderson and Officer Thompson to take the objects from her hand and handcuff her for her own protection and ours. Do you recall this statement in your report?
>
> A. Yes I do.
>
> Q. So you directed the officer to take the object out of her hands?
>
> A. Yes, I did.

Sergeant Karuzis also stated earlier in this same interview:

> A. . . . She was sitting in arm chair in the living room. She was grasping the arms of the chair and I could see in her face the anger, and she was very upset. I had a brief talk with the officers and we agreed to get an ambulance and that she needed medical attention. At this time, I didn't know what her problem was, whether it was a medication or if it was a mental health problem. I called for an ambulance. And then as I did, she was grabbing things from a table while she was sitting in the chair. I saw a metal

> object in one of her hands and she started kicking. Officer Anderson was standing to the left of her, excuse me he was on her right, and Officer Thompson was standing on her left as she was seated. She still had the objects in her hand. We tried to calm her down to tell her to stop grabbing these objects and calm herself, but she did not. So I told the officers to handcuff her. First, they tried to open her hands and remove these objects from her hands. . . .

Based on the totality of all evidence it cannot be concluded, as the City argues, that Officer Thompson acted inappropriately in asking Mrs. Raymer to remove the items from her hand. A review of the record does not suggest that Officer Thompson inflamed the situation by asking Mrs. Raymer not to have these objects or not to smoke. Although this was not a situation in which the officers were acting to preserve their own safety they were legitimately concerned about an unstable woman who had expressed her desire to fight the decision to go to the hospital. Moreover, it is also significant that the City did not discipline Sergeant Karuzis[20] and presumably credited his version of what occurred at 17 Perley Street. Thus, the officer in charge believed that Mrs. Raymer should not be holding these objects. Accordingly,

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[20] No discipline was imposed upon Sergeant Karuzis and he certainly believed that police intervention was appropriate. Nor does the record support that Officer Karuzis decided to have Mrs. Raymer handcuffed because Officer Thompson was the one that first approached Mrs. Raymer and caused the situation to be out of control. Nowhere does Sergeant Karuzis indicate that it was because of Officer Thompson's intervention that he concluded that Mrs. Rayner should be handcuffed.

SEQ 126 JOB 11122AE1-000-05 PAGE-036 LAMANA
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it was must be concluded that it was not unreasonable for Officer Thompson to attempt to have Mrs. Raymer remove the items from her hands.

After Mrs. Raymer refused Officer Thompson's request to remove the items from her hands he approached her and grabbed her left wrist. The testimony shows that Officer Thompson successfully pried her fingers open and Mrs. Raymer dropped the items. Officer Thompson stated that he then isolated her left hand and was trying to bring the arm down by her side when he heard a snap and her arm broke. Mrs. Raymer, however, stated that her arm was broken when Officer Thompson had hold of her arm and was pushing backwards while grabbing at her hand to open her fist.

I would agree with the City's contention that it is irrelevant, for purposes of this inquiry, whether Mrs. Raymer's arm was in the up or the down position. What appears certain is that Officer Thompson did not take out his handcuffs to restrain Mrs. Raymer.[21] Thus, it is not in the act of handcuffing Mrs. Raymer that Officer Thompson broke Mrs. Raymer's arm, rather it was in his effort to control her arm and get the objects out of her hand, that precipitated the injury.

The question is when does reasonable force end and become excessive and unnecessary force. There is a dispute as to whether Mrs. Raymer told the officers to stop because they were hurting her, and that she would cooperate with them. Mr. Raymer standing in the other room

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[21] Indeed, it would have made no sense to attempt to handcuff Mrs. Raymer with her hand in the up position.

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testified that he heard his wife make these statements. Officer Thompson and Officer Anderson testified that they did not hear these statements. Officer Anderson stated that Mrs. Raymer was thrashing about in the chair and did not stop until her arm was actually broken. In my view it is likely that Mrs. Raymer made the statement about her arm being hurt but it is also likely that both Officer Thompson and Officer Anderson did not hear her make the statements. Both officers were attempting to focus on controlling Mrs. Raymer's hands. Officer Thompson was concentrating on removing the objects from her hands. Mrs. Raymer was swearing and yelling and had repeatedly stated that she would not cooperate with the police. Thus, it is most probable that in the chaotic state of affairs in the apartment that neither of the Officers heard Mrs. Raymer make the statement. Moreover, even if the statement was made, both officers had hold of her hands at the time the statement was made and there would have no way of knowing if the statement was directed to Officer Thompson or Officer Anderson.

Moreover, the evidence does not lead to the conclusion that Officer Thompson took the action because he lost his self control and intended to harm Mrs. Raymer or that he acted based upon Mrs. Raymer's verbal outbursts towards the police. The record shows that his actions were solely motivated to take the items away from Mrs. Raymer's hand.

Based upon Mrs. Raymer's actions in the apartment that evening and her statements that should would not cooperate with the police, it is certainly logical that Mrs. Raymer was thrashing about in the chair when Officer Anderson and Thompson had hold of her arms and in

SEQ 128 JOB 11122AE1-000-05 PAGE-038 LAMANA
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part contributed to the twisting of her arm. Both doctors testified that they could not establish how much force Officer Thompson used and whether Mrs. Raymer contributed to the fracture by her resistance. Dr. Brendze's testimony with regard to past prescribed steroid use by Mrs. Raymer and the impact that this had on her bone structure was important and significant. Dr. Brendze reviewed Mrs. Raymer's medical records and testified that there was a "thinning of the cortex of the bone" and that due to Mrs. Raymer's history of steroid usage in the past "that it was likely that bone loss occurred and affected the fracture threshold". This testimony certainly cast serious doubt that it was because of Officer Thompson's use of excessive force that caused Mrs. Raymer's arm to break.[22]

The Grievant's Past Employment Record

Another issue in the case is Officer Thompson past employment record. The hearing officer concluded:

> In his eighteen years as a Lynn Police Officer, Officer Terrance Thompson has demonstrated that he is unable to conform his behavior to the Rules and Regulations of the Lynn Police Department. Violations of law and the Rules and Regulations of the Lynn Police Department have caused injury to citizens and financial liability to the City. It is likely that the most recent action will subject the City to further liability. I believe

[22] Dr. Mulhern had not studied Mrs. Raymer's past use of steroids as had Dr. Brendze. Even Doctor Mulhern testified that steroid use could impact a person bone structure.

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SEQ 129 JOB 11122AE1- 000-05 PAGE-039 LAMANA
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as the appointing authority, your decision is clear cut.

There may be a certain point where an employer decides that because an employee is often the defendant in civil rights actions and continuously places the City and Department in risk of civil right judgments, that the employer has the right to discharge an employee. Indeed, this appears to be part of the City's motivation in discharging Officer Thompson. What is particularly troubling is that Officer Thompson's past employment record in no way supports the conclusion that he can not conform his behavior to the rules of the Department. Seven instances of civilian complaints were filed against Officer Thompson. The record demonstrate that five of the complaints were determined by the Department to be "unsubstantiated" for one of the charges Officer Thompson was "exonerated" and for only one of the charges was it determined to be "part-substantiated". It is important to note that all of these complaints were filed in 1984, almost ten years from the date of the present incident. Moreover, four of these related to one establishment. Except for the one incident mentioned below there is no discipline in Officer Thompson's personnel record.

The City, nonetheless, maintains, that Officer Thompson was the defendant in a civil rights action in 1992 for injuring a civilian by excessive force in handcuffing the individual. A jury awarded $100,000 against the City for this occurrence. Officer Thompson initially received a disciplinary suspension by the Department for this incident. The suspension, however, was reversed in

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SEQ 130 JOB 11122AE1-000-05 PAGE-040 LAMANA
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its entirety by another arbitrator.[23] Thus, at the time of the present proceeding, Officer Thompson was in his nineteenth year of employment and his personnel record shows that no prior discipline exists and where imposed it was found to be unwarranted for excessive force.

It is one thing to believe that an employee has a bad attitude; such beliefs, however, must be based on what exists in the employment record and not subjective feelings. It is therefore arbitrary for the City to have concluded that based upon Officer Thompson's past employment record there is pattern of callous rogue behavior or that Officer Thompson could not conform his behavior to the policies of the Department. Based on the totality of all the evidence there is no justification to conclude that Officer Thompson used excessive force in violation of the Department's Rules and Regulations.

II. Cooperation in the Departmental Investigation

Officer Thompson was found to have violated Section (F) (6) for failing to cooperate fully in the Department's internal investigation. Officer Thompson completed a report after the incident. It is true that the report was brief and had grammatical errors but this in and of itself cannot be considered as a punishable offense, never mind be the basis of the grievant's discharge. Deputy Suslack never asked Officer Thompson to complete a supplemental report.

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[23] There apparently was no written arbitration decision issued in this case.

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SEQ 041 JOB 11122AE2- 000-02 PAGE-041 LAMANA
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Moreover, a review of Officer Thompson's report and in the Department investigation, it appears that Officer Thompson truthfully answered the question to the best of his memory. Moreover, a review of all the reports and the departmental interviews of all three police officers shows a remarkable consistency in what all three police observed and how they behaved on the evening in question. This charge has not been proved by the evidence submitted at the arbitration hearing.

III. Conduct Unbecoming a Police Officer.

Rule G (2) of the Lynn Police Department prohibits conduct that is described as unbecoming a police officer. There can be no question that the gravamen for the discharge of Officer Thompson was the charge that he used excessive force against Mrs. Raymer, in violation of Rule G (5). In this regard, as stated above, the evidence does not demonstrate that Officer Thompson was guilty of this charge. Accordingly, the discharge of Officer Thompson must be reversed.

Although exonerated of the charge of excessive force, the conduct of the officers at the scene is certainly deserving of no awards. There can be no question that Officer's [sic] Thompson handling of this mentally unstable woman was lacking in sensitivity. Moreover, there seems to be overall confusion as the Police Department's role in the involuntary commitment process of this women. Lack of sensitivity, in this one instance, however, is not a dischargeable offense. Moreover, as stated above Officer Thompson has no existing disciplinary infractions in his employment record. Accordingly, the discharge must be

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SEQ 132 JOB 11122AE1- 000-05 PAGE-042 LAMANA
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rescinded and converted to a two week disciplinary suspension for violation of Rule G (2).

Conclusion and Award

For the reasons set forth more fully in the above decision the grievance must be sustained. There was not just cause for the discharge of Officer Terrance Thompson. The discharge must be rescinded. In it place there must be imposed a two week suspension. Officer Thompson shall be reinstated to his position and is to receive all pay and benefits he lost as a result of his discharge, except for the aforesaid two week suspension. Finally, the grievant's back pay should be offset by any interim earnings or unemployment compensation that he received from the date of his discharge until he is reinstated to his position. In addition jurisdiction will be retained by the arbitrator for sixty days to resolve any issues that pertain to implementation of this remedy.

January 8, 1996 /s/ Gary D. Altman
Boston, Massachusetts Gary D. Altman

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Supreme Court, U.S.
FILED
JAN 4 2002
CLERK

(2)

No. 01-0834

In The

Supreme Court of the United States

CITY OF LYNN,

Petitioner,

v.

TERRANCE THOMPSON,

Respondent.

On Petition For Writ Of Certiorari To The Massachusetts Supreme Judicial Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Massachusetts Supreme Judicial Court correctly affirmed an arbitrator's award that reinstated Terrance Thompson as a City of Lynn Police Officer, holding that the award does not violate public policy, state or federal.

PARTIES TO THE PROCEEDING

Petitioner is the City of Lynn (hereinafter "City"). Respondent is Terrance Thompson (hereinafter "Thompson"). None of the parties hereto are corporations.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Thompson respectfully submits that the decision of the Massachusetts Supreme Judicial Court correctly applied the governing law in the Commonwealth of Massachusetts and that the instant Petition for Writ of Certiorari presents no valid grounds for review and thus should be denied.

STATEMENT OF THE CASE

The controlling facts are set forth in detail in the Arbitration Award. (Appendix "Pet. App." 40-80).

ARGUMENT

I. THE MASSACHUSETTS SUPREME JUDICIAL COURT CORRECTLY HELD THAT THE ARBITRATOR'S AWARD REINSTATING TERRANCE THOMPSON DOES NOT VIOLATE PUBLIC POLICY.

A. The Facts Found by the Arbitrator Are Final.

Despite the persistent yet erroneous yearnings of the City in its Petition and throughout its post arbitration filings that Thompson was responsible for breaking Elizabeth Raymer's (hereinafter "Ms. Raymer") arm, it cannot ignore the arbitrator's contrary ruling. After many arbitration hearing days, the arbitrator found that Thompson did not use excessive force in his contact with Ms. Raymer and that he was thus not responsible for breaking her arm. Pet. App. 78. It matters not how many

times the City's Petition states and restates that Thompson broke Ms. Raymer's arm while restraining her because the singular salient fact to this proceeding is that the mutually selected arbitrator cleared Thompson of using excessive force. Pet. App. 78. Facts found by arbitrators are final and any errors that may have been made by the arbitrator are not subject to review. *Eastern Associated Coal Corporation v. United Mine Workers of America, District 17*, 531 U.S. 57, 62 (2000). Though the Massachusetts Supreme Judicial Court opined that some of the Thompson arbitrator's findings were unsound, it held that the court must accept the findings, even if believed that they are "grossly erroneous." *City of Lynn v. Thompson*, 435 Mass. 54, 61-62 (2001). Federal law is no different.

B. No Public Policy Has Been Violated That Would Preclude the Arbitration Award's Reinstatement of Thompson.

The City contends that 42 U.S.C. § 1983 is a public policy that would preclude the enforcement of the arbitration award reinstating Thompson to the position of police officer for the City of Lynn. This statute, 42 U.S.C. § 1983, is remedial in nature as it provides a mechanism of redress for collecting damages in civil actions and provides no substantive rights. *City of Canton v. Harris*, 489 U.S. 378, 395 (1989); *Monroe v. Pape*, 365 U.S. 167, 170-175 (1969). Despite this, the City asserts that it may not be able to defend itself against liability in future civil rights cases naming Thompson as a defendant because of an adverse jury verdict in the early 1990s against Thompson for excessive force, and because it decided to

settle the lawsuit brought by Ms. Raymer.[1] The City also argues that it would be absolutely liable in future civil rights actions. Therefore, it postulates, public policy requires that Thompson cannot be reinstated as a police officer.

The City misunderstands the municipal liability standard required in civil rights cases. The principle of *respondeat superior* does not apply to local governmental entities for purposes of § 1983 liability. *City of Canton, supra* at 385; *Monell v. Department of Social Services*, 436 U.S. 658, 694-695 (1978). Municipal liability would lie only for a municipality's unconstitutional policies, practices, and customs that cause the plaintiff's constitutional deprivation. *Id.* Despite the City's arguments about speculative potential future civil liability, it offers this Court no authority from any court of this land, any statute, or any regulation to support its contention that this "public policy" must void the arbitration award that reinstated Thompson.[2] If the City's arguments prevail, then

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[1] Given that police officers are charged with enforcing laws, sometimes they must use force to affect such and some harm may result to individuals when a police officer justifiably uses force. *See Graham v. Connor*, 490 U.S. 386, 390 (1988) (use of force by police that results in citizen sustaining broken foot, cuts and injured shoulder may not be constitutionally excessive); *Dean v. City of Worcester*, 924 F.2d 364, 369 (1st Cir. 1991) (police use of force resulting in cut nose, scratches and welts was reasonable); *Commonwealth v. Garner*, 423 Mass. 735, 744-745 (1996) (use of stun grenade during execution of search warrant was reasonable even though little girl allegedly injured.).

[2] The absence of the City's authority to support its proposition speaks to the rarity of the application of the public policy exception. The type of cases which have implicated the

disciplinary decisions regarding public employees would be made by juries who reach verdicts and politicians who authorize settlements of suits. This cannot be the basis of a public policy.

C. *Eastern Associated Coal Corporation* Supports the Premise That Thompson's Arbitration Award Does Not Violate Public Policy.

The City suggests that *Eastern Associated Coal Corporation v. United Mine Workers of America, District 17*, 531 U.S. 57 (2000) is distinguishable from the case at bar and thus should not to be considered by this Court. This suggestion reflects an entire misreading of the case as *Eastern Associated Coal* strongly supports Thompson's position that his reinstatement award does not violate public policy.

Eastern Associated Coal held that an arbitrator's reinstatement of an employee (a truck driver) who failed two

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public policy exception stem from potential incidents of mass destruction to the general public. *See Exxon Shipping Co. v. Exxon Seamen's Union*, 993 F.2d 357 (3rd Cir. 1993) (positive drug testing helmsman runs oil tanker aground); *Gulf Coast Indus. Workers Union v. Exxon Oil Co.*, 991 F.2d 244, 252 (5th Cir.), *cert. denied*, 114 S.Ct. 441 (1993) (positive drug testing petro-chemical technician); *Delta Air Lines, Inc. v. Air Pilots Ass'n Int'l*, 861 F.2d 665 (11th Cir. 1988), *cert. denied*, 493 U.S. 871 (1989) (intoxicated air line pilot); *Iowa Elec. Light & Power v. Local Union 204 of the Int'l Bhd. Of Elec. Workers*, 834 F.2d 1424 (8th Cir. 1987) (safety violating nuclear plant worked); *Amalgamated Meat Cutter & Butcher Union v. Great W. Food Co.*, 712 F.2d 122 (5th Cir. 1983) (drunk tractor trailer driver). In all of these cases, however, the arbitrator found the employee committed the conduct charged, unlike the arbitrator here.

drug tests did not violate public policy. The Court reasoned that due to a regulatory scheme in place concerning truck drivers, termination was not required and that rehabilitation was encouraged. The employee's suspension was within the arbitrator's authority and consistent with the parameters of the regulatory scheme. *Eastern Associated Coal* recognized that people can differ as to whether reinstatement or discharge is the more appropriate remedy, but both parties agreed to entrust the remedial decision to an arbitrator.

The case is similar to this in that both arbitrators reinstated employees, but imposed a period of suspension. In Thompson, the arbitrator suspended him for two weeks for his insensitive treatment of a mentally ill woman. Pet. App. 79-80. The Thompson facts are more compelling than those in *Eastern Associated Coal* in showing that public policy should not void the award implementation. The key difference between the *Eastern Associated Coal* truck driver and Thompson is that Thompson did not commit the gravamen of the charges brought against him. The arbitrator found that Thompson did not use excessive force in restraining Ms. Raymer whereas the other arbitrator found that the truck driver twice committed a criminal act by failing drug tests. Though the City dislikes the arbitration result, it received what it agreed to and bargained for with the police union: a hearing process with an independent arbitrator entrusted with this remedial decision. *Eastern Associated Coal, supra* at 67.

Assuming *arguendo* that § 1983 is an applicable source of public policy, then similarly to the regulatory scheme applicable to the truck driver in *Eastern Associated*

Coal this federal statute does not require that its violators be terminated. In fact, § 1983 is silent as to the employment implications of its violators. This is so because by its terms § 1983 provides no rights but only an avenue of civil redress. *City of Canton, supra* at 395; *Monroe, supra* at 170-175. Had Congress in 1871, or at any time subsequent thereto, desired to mandate termination of violators of § 1983, then the legislature would have voted to amend the Act in the past 130 years. Employment disputes in the public sector are commonly resolved by arbitration which provides for an informal, yet inexpensive means of final resolution of disputes stemming from collective bargaining agreements. That is exactly the case at hand. The arbitrator heard evidence presented by counsel for both parties and entered an award that was within the scope of the agreed to arbitration issues. Pet. App. 40-41. Like *Eastern Associated Coal*, no public policy is implicated or violated to prevent the arbitrator's reinstatement of Thompson.

CONCLUSION

The Petition for Writ of Certiorari fails to demonstrate any valid grounds for review of the decision below and should be denied.

Respectfully submitted,

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January 2002